A DIMINISHING PURVIEW: A CRITIQUE OF ARTICLE 2(7) OF THE UNITED NATIONS CHARTER AND SOME REFLECTIONS ON ITS APPLICATION.

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Partial Fulfilment of the

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Degree of Master of Laws.

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DECLARATION

I, **Jeremiah Makokha Nyegenye** do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other institution.

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This thesis is submitted for examination with my knowledge and approval as the university supervisor.

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DEDICATION

To the memory of the late Naomi Kageha.

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I would like to thank foremost the University of Nairobi for the scholarship awarded to me to study for the degree of Master of Laws (LLM).

I would like to thank also Dr. Githu Muigai of the Faculty of Law, University of Nairobi for his very useful and thought provoking comments as I went about preparing this work.

I owe a debt of gratitude to Ms. Grace Kamau, Mr. Dan Juma, Mr. Fidelis Wangata and Ms. Noor Awadh Ghalgan.

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ABSTRACT OF THESIS

The aim of this thesis is to explore the history of the "domestic jurisdiction clause" of the United Nations Charter whose essence is to prohibit the United Nations from intervening in matters which are essentially within the domestic jurisdiction of any state, and to consider the relevance and utility of the Article.

The first Part of the thesis is a historical analysis and anatomical dissection of Article 2(7) aiming at ascertaining the meaning and scope intended by the originators of this complex and mysterious Article. The Article leaves open to controversy, questions pertaining to what the term intervene encompasses.

The thesis investigates the exact scope of the prohibition as well as the enduring disputation on what is meant by "matters essentially within the domestic jurisdiction." It also forays into the inescapable question of the authority vested with the competence to make a determination whether or not Article 2(7) has been violated. The discussion of these questions in the first Part of the thesis sets necessary stage for the second Part of the thesis.

The second Part of the thesis explores how the Article has been applied to address contemporary questions confronting the world. In so doing, recourse is had to the history of the drafting of the United Nations Charter and the writings and commentaries of scholars thereon, as well as the practice of the United Nations across the years. Particular attention is focused on the conduct of the international financial institutions, which are specialized agencies of the United Nations.

The thesis scrutinizes the interaction of these institutions with the members of the United Nations, particularly those from the Third World, vis- a-vis the prohibitions of Article 2(7). This Part also considers a growing and disturbing trend of intervention by stronger states against weaker ones in circumstances that threaten to render Article 2(7); indeed the entire Charter, irrelevant.

Ultimately, the thesis makes an assessment of the continued relevance and efficacy of Article 2(7) today and proposes the way forward in addressing the problems raised by the Article. The conclusion is drawn that whatever may have been the intentions of the drafters of the Charter, the purview of Article 2(7) has considerably diminished and the Article continues to be under assail thanks to the advent of globalization.

The thesis urges another look at Article 2(7) that benefits from hindsight and that is alive to the contemporary realities of international law and politics.

ABBREVIATIONS

ABAJ	American Bar Association Journal
AJIL	American Journal of International Law
BYIL	British Year Book of International Law
ESC	Economic and Social Council
G.A.	General Assembly
GAOR	General Assembly Official Records
GA Res.	General Assembly Resolutions
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
IFI	International Financial Institution
Comp	International Comparative Law Quarterly
ILC	International Law Commission
ILQ	International Law Quarterly
LNTS	League of Nations Treaty Series
LNOJ	League of Nations Official Journal
LQE	The Law Quarterly Review, London
NATO	North Atlantic Treaty Organization
OAS	Organization of the American States
OAU	Organization of the American States
Off. Rec.	Official Record
PCIJ	Permanent Court of International Justice
R.C.	Hague Recueil des Cours
SCOR	Security Council Official Records
S.G.	Secretary General
U.K.	United Kingdom
U.N.	United Nations

UNCIO	United Nations Conference on International Organization, San Francisco, 1945
UNTS	United Nations Treaty Series
U.S.	United States of America
USSR	Union of Soviet Socialist Republic
YLJ	Yale Law Journal
YUN	Year Book of the United Nations

PART I: A CRITIQUE OF ARTICLE 2(7)

CHAPTER 1

ON THE PROBLEM OF ARTICLE 2(7) AND THE SCOPE OF THE STUDY

1.1 Introduction

It is perhaps no great exaggeration to say, and perhaps it should come as no surprise that no single clause in the Charter of United Nations is as crucial to the very existence of the community of Nations as article 2(7). This is because this Article is largely responsible for the consent of most of the states to be bound by the Charter. The states understand that by subscribing to the United Nations Organization, they do not thereby yield sovereignty to the Organization, to meddle in those affairs, which the states consider to be their sole prerogative.

What is surprising is that no single clause is as ambiguous and nebulous and open to subjective interpretation as this important clause often referred to as the domestic jurisdiction clause. As early as 1925, Brierly, J. L., commenting on Article 15 of the Covenant of the League of Nations, which article was the predecessor of the present Article 2(7) of the Charter, could write:

> "Article 15 of the Covenant of the League of Nations has introduced into the terminology of international law a phrase which already shows signs of becoming a new catchword, and which is capable of proving as great a hindrance to the orderly development of the subject as

> the somewhat battered idols of sovereignty, state equality, and the like have been in the past. ..[1]

Article 15 of the Covenant laid down the method of procedure to be applied to those "disputes likely to lead to a rupture" which not having been submitted to arbitration or to judicial settlement had in accordance with Article 12 to be submitted to inquiry by the Council. Paragraph 8 thereof with which we are concerned provided -

> "If the dispute between the parties is claimed by one of them and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendations as to settlement".

The purpose of this paragraph was apparently to allay the fears of certain states, notably the United States of America, of foreign interference in their domestic affairs[2]. Its effect was to exclude the class of disputes to which it referred not from submission to or consideration by the Council, for without these the Council could not make the necessary finding as to the nature of the dispute, but from the power vested in the Council by Article 15 in the case of other disputes to make "a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto".

At the inception of the United Nations Organisation, Article 15(8) was to metamorphose into the present Article 2(7) of the Charter, which provides as follows:

---

1 J. L. Brierly, "Matters of Domestic Jurisdiction," *British Year Book of International Law* (1925): 9.

2 D. R. Gilmour, "The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter – An Historical Perspective," *International Comparative Law Quarterly* Vol.16 (1967): 331.

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

But if the phraseology of the domestic jurisdiction clause changed, its complexity and mind-boggling ambiguity did not. Forty years after Brierly's lament on Article 15, D. R. Gilmour[3] was to say:

> "It is probably true to say that no Article of the Charter has caused more trouble than this one. Its relatively simple terms contain a dual danger. By its terms the United Nations is prohibited from "intervening" but this prohibition only applies to essentially domestic matters. Thus, the competence of the United Nations is, in this respect defined with reference to two fluid and controversial subjects."

The position is no less true today, more than three decades later, than it was at the time when Gilmour wrote.

1.2 The Problem

Although Article 2(7) of the United Nations Charter has been in existence and operational for more than fifty years, little is known about its exact meaning and scope and less still is agreed upon either by the states who are primary subjects of the Charter or by writers and commentators.

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3 Gilmour, (1967): 7.

The Article proscribes any intervention by the United Nations in matters, which are essentially within the domestic jurisdiction of a state save the application of enforcement measures under Chapter VII of the Charter. Its predecessor, Article 15(8) of the Covenant of the League of Nations used the words *"a matter which by international law is solely within the domestic jurisdiction of a state."*

It gave the competence of determining that a matter was within the domestic jurisdiction to the Council and stopped the Council upon so finding from making any recommendation as to its settlement.

The considerably changed phraseology of Article 2(7) is ominously wanting in detail and clarity of terms. For a start, what had changed in this new Article? Was the *raisson d'etre* and philosophy of Article 2(7) the same as that of Article 15(8)? If not, what was the primary change that was sought to be achieved? It was unclear and has remained so to date what is meant by "intervene" and what acts do or do not constitute intervention within the contemplation of the Article.

No effort was made to elucidate what was meant by the term "matters which are essentially within the domestic jurisdiction of any state" leaving it to conjecture whether the expression "by international law" which had been removed from the predecessor Article was to be understood to be implicitly present nonetheless.

A grave lacuna in Article 2(7) was the absence of any reference to any organ as being authorized to determine the circumstances in which the Article applied or to give authoritative interpretations of it.

The consequence of the foregoing scenario is that in the application of Article 2(7) the Pandora's box was thrown open for an important area of international law to be the subject of hazardous speculation and self-interest driven interpretations posing a danger not only to the orderly development of international law but also to international peace and security.

As a result, intervention has tended to be a function of ideology and power so that the prohibitions of Article 2(7) have had to be postponed as against the interests of the super powers. For their part, when it has suited their interests, these self-same powers have sought refuge in Article 2(7) so as to resist international scrutiny of their actions.

On the other hand, increased globalisation has meant that a lot of the territory traditionally hallowed, as being within the exclusive competence of states has had to yield to the jurisdiction of the United Nations. This has included such areas as human rights, exploitation of natural resources, environmental matters as well as trade.

On their part the international financial institutions, which as we shall see in Chapter 6 are organs of the United Nations and therefore subject to Article 2(7), have

dictated their terms in virtually every area of life of some states particularly those in the Third World entirely, oblivious of the provisions of Article 2(7).

We proceed in this study from the premise that the time is nigh for a reconsideration of Article 2(7). The purpose of the present study therefore, is to consider the meaning and impact of Article 2(7) and reflect on its application vis-à-vis the contemporary realities of the dynamics of international law and politics.

We propose in this study to consider firstly the meaning that has evolved with regard to this ambiguous Article of the Charter, and secondly to reflect on whether the practice in the arena of international relations corresponds to that meaning.

In the final analysis, this study considers whether in the light of all the developments that have taken place in international politics and law since the San Francisco Conference of 1945, Article 2(7) still has meaning and more importantly, what relevance it has in a rapidly globalising world.

What is now required and which is the purpose of the present study is a re-think of the entire Article 2(7) that benefits from the hindsight, maturity, experiences and legal precedents of fifty years so as to re-draft Article 2(7) to bring some (more) meaning and reduce the controversy surrounding this cardinal Article. Sixty years is too long a time to have a meaningless or ambiguous clause in a document as important as the Charter.

Although many writers and commentators have examined one or other aspect of Article 2(7), few if any studies have examined the problem created by the totality of the Article particularly in the light of the practice of the United Nations across the more than five decades of the existence of the Article.

1.3 Background

We have raised several problems, which are the consequences of the metamorphosis of the domestic jurisdiction clause from Article 15(8) of the Covenant to Article 2(7) of the Charter. To understand why the problems are so pressing, it is opportune to examine the background of the issues raised.

The Covenant of the League of Nations recognized that there existed a reserved domain of matters relating to states, which are not in principle the subject of international jurisdiction. The Covenant established the League of Nations as a standing organization with compulsory jurisdiction for the conciliation of disputes likely to lead to a rupture.

Article 15(8) stated the reserved domain by reference to the objective criterion of international law instead of by the completely subjective phrases of the old formula. In addition, it expressly placed the power of deciding whether the reservation applied in a particular case in the hands of the Council or the Assembly instead of leaving it to the less than impartial appreciation of the parties to the dispute.

This clause achieved the dual purpose of assuming the existence in the international law of that epoch of a reserved domain of domestic jurisdiction and yet leaving the definition of that domain to be extracted from the rules of contemporary international law.

The question that must inevitably be asked is whether at the shift from Article 15(8) of the Covenant to Article 2(7) of the Charter the underlying principles and intendment of the former were retained. This conclusion is usually tempting because any exposition of the domestic jurisdiction clause whether in the Covenant or in the Charter era retains the Advisory Opinion of the Permanent Court of International Justice in the Nationality Decrees in Tunis and Morocco Case[4] as the *locus classicus* on domestic jurisdiction even though it was an interpretation of Article 15(8) and not Article 2(7).

The Opinion concerned a complaint by Great Britain in regard to French Nationality Decrees the effect of which was to convert into French subjects certain categories of British subjects resident in Tunis and Morocco. Great Britain proposed the submission of the dispute to the Court for a decision on the merits, to which France objected that questions of nationality are too intimately connected with the actual constitution of a state to make it possible to consider them as questions of an "exclusively juridical" character. Great Britain disagreed and sought to submit the dispute to the Council of the League. France replied that before the Council she would rely on the reservation of matters of domestic jurisdiction in Article 15(8) of the Covenant. The two parties then held further discussions as a result of which they:

4 P. C. I. J. Reports, Series B, No. 4.

(a) asked the Council to request the Court for an advisory Opinion on the question whether the dispute was or was not by international law solely a matter of domestic jurisdiction within the meaning of Article 15(8) and

(b) agreed that if the Court advised that it was not solely a matter of domestic jurisdiction, they would submit the dispute to arbitration or judicial settlement.

The Council endorsed this plan and referred the question in (a) to the Court for an Advisory Opinion.

The Court concentrating on the phrase "solely" within the domestic jurisdiction held :

> "The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs solely to that party ...
>
> ... The words solely within the domestic jurisdiction ....seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one state, are not in principle, regulated by international law. As regards such matters each state is sole judge.

The Court continued --

> "The question whether certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations. Thus in the present state of international law, questions of nationality are in the opinion of the Court, in principle within this reserved domain.
>
> For the purpose of the present opinion, it is enough to observe that it may well happen that in a matter which like that of nationality is not in principle regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction, which in principle belongs solely to the state, is limited by rules of international law. Article 15(8) then ceases to apply as regards those states which are entitled to invoke such rules and the dispute as to the question whether a state has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph ..."

The Court concluded that recourse to principles of international law was necessary in order to pronounce on the points of dispute between the parties and held that this sufficed to prove that the dispute did not arise out of a matter which by international law was solely within the domestic jurisdiction of France.

Similar lines of thought were pursued by the Court in later cases. In the Courts' Advisory Opinion on the Treatment of Polish Nationals in Danzig,[5] the issue of domestic jurisdiction arose in the form of a substantive issue concerned with the extent of Poland's right to intervene in Danzig. The issue was whether Poland was entitled to submit to the arbitration of the League's High Commissioner for Danzig complaints in regard to what she conceived to be the misapplication of the Danzig

5 P. C. I. J. Series A/B, No. 44.

Constitution to polish nationals resident in Danzig. Poland conceded that in general, the application of a constitution is essentially a matter of domestic concern but contended that owing to the peculiar character of the Danzig Constitution, the ordinary legal distinction between matters of a domestic and of an international character did not hold good in the instant case."

The Court although it expressly endorsed the view that the interpretation and application of a constitution is in principle a matter of domestic concern, at the same time underlined that the domestic character of a state's constitution only holds good to the extent that it is not modified by the states' international obligations. It said:

> "Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig".

In another case; the Exchange of Greek and Turkish Populations Case.[7] the Court held that the interpretation of a treaty, although it might relate to a point of Turkish domestic law was necessarily a question of international law and not one of domestic concern.

---

6 P. C. I. J. Series B, No.10, 17.

7 P.H. Winfield, "The History of Intervention in International Law," *British Year Book of International Law* (1922-3): 130

In sum, the question earlier posed remains: what is the significance of these decisions seeing that they were based on the language of the old domestic jurisdiction clause and not the markedly different language of Article 2(7)?

Article 2(7) introduced the new word "intervene" into the principle of domestic jurisdiction but neither defined it nor gave a guide as to what sort of conduct was proscribed as constituting intervention. The result was that there was no clear definition of what was prohibited with the consequence that the arena was set for protracted controversies on the meaning of the word "intervene" as used in this Article.

A distillation of the array of literature on intervention and United Nations practice brings to the fore two main points of view on the meaning of the word "intervene" as used in Article 2(7). One view is that the word must be interpreted in the technical sense of international law to mean a usurpation of sovereignty or "dictatorial interference". The opposing view is that the term is not one of art and accordingly it must have only the dictionary meaning of ordinary interference. Either view has vehement support among eminent writers.

I propose in this study to analyse the contrasting points of view as well as the practice of various organs of the United Nations across the years, and to formulate what appears to be the widely acceptable meaning of the term "intervene" as used in Article 2(7).

Even assuming that the drafters of Article 2(7) had defined the term intervention, the next question, which we must now consider, would still have remained. What is meant by the term "matters which are essentially within the domestic jurisdiction of any state?" Article 15(8) of the Covenant used the word "solely" and in the French version "exclusively". The question we must explore is whether, and if so, what difference in meaning this change occasioned. It must also be noted that the words "by international law" were deleted from the formula of the domestic jurisdiction clause. Why was this done and what was the effect?

It has been argued that it was felt that the formula "essentially" instead of the formula "which by international law was within domestic jurisdiction", left the door open to the evolutionary expansion of the authority of the United Nations at the expense of the domestic jurisdiction of the states. In practice differences on what was meant by the new formula have been many and have mainly involved the Security Council and the General Assembly.

To the issue of the competence to make a determination that a matter is essentially within the domestic jurisdiction of a state, Article 2(7) is silent. As has already been observed, Article 15(8) of the Covenant was express in stipulating that it was the Council of the League of Nations, which had the authority of deciding whether in any particular case the reservation of domestic jurisdiction applied. By its ominous silence on this score, Article 2(7) has created a chronic controversy pitting two main diametrically opposed interpretations.

On the one hand are those who argue that by failing to prescribe an organ as being responsible for determining the applicability of the domestic jurisdiction reservation, Article 2(7) of the Charter left it to individual states to make that determination in any case in which their interests are involved.

On the other hand and no less vehement is the school of thought which considers auto interpretation to be absurd and unacceptable and which argues that the interpretation of Article 2(7) must vest in the various organs of the United Nations.

What then has been the consequence of the problems created by Article 2(7) in practice?

Because of the convoluted nature of the wording of this Article, which admittedly is at the very core of states' subscription to the Charter, very contrasting results have as we have earlier observed, occurred as this Article was confronted with new developments in the evolution of international relations. These developments have included: the maturation of human rights and humanitarian law, the widespread collapse of constitutional systems in Asia, Africa and Latin America, the end of the bipolar cold war era and the onset of the unipolar American hegemony, globalisation of political and economic issues and the advent of the information technology revolution.

The consequence of the problems created by Article 2(7) is thus easy to appreciate. A basic principle upon which the intercourse of states is predicated is drafted in an amorphous and ambiguous manner whereunder no one is certain what is prohibited.

no one is certain in what circumstances it is prohibited and no one is certain who is to make the determination of the circumstances in which the prohibition applies. It consequently behoves the application of the practice to resolve those questions. But therein lurks the danger. It is the subjects of the Article with their various self-interests who must interpret and abide by it!

1.4 The Purpose of the Study

The purpose of the present study is to investigate, analyse and evaluate the various conflicting interpretations on the meaning and scope of Article 2(7) with a view to erecting some consensus supportable by the practice of the various organs of the United Nations. With the benefit of almost six decades of United Nations practice and legal precedents, I intend to reduce the controversy surrounding the meaning of Article 2(7) by considering and comparing the various views propounded and comparing them to the practice of the United Nations across the years. Having arrived at what I consider to be learned consensus on the meaning of the various terms and expressions used in the Article, I intend to propose a draft amendment to the provisions of the Article so as to remove the ambiguity and aid in the better understanding of the domestic jurisdiction reservation Article. I intend to consider the relationship between the meaning of Article 2(7) both as originally intended and as it has evolved in contemporary international practice. Ultimately, it is the purpose of this study to determine the relevance of the continued retention in its present text of Article 2(7) and whether it is adequately and equitably beneficial to all its subjects.

1.5 Significance of the Study

Although the shelves are replete with learned works on various aspects of Article 2(7), the literature is deficient in a few very material particulars:

Firstly various authors have been content to examine only one or other aspect of the law (and politics) and practice of the Article. Examples of this include an examination of the history of the domestic jurisdiction Article, expositions on the meaning of "intervene" in the context of that Article, examinations of the phrase "essentially within the domestic jurisdiction", treatises on the competence to interpret the Article, human rights issues in the light of the Article, regulation of armaments, peace keeping operations and the conduct of the international financial institutions among others.

The present study seeks to go further than existing literature by analysing and examining the fragmented and piecemeal approach adopted by authors to the study of Article 2(7). In so doing, the present study will not only examine the foregoing aspects of the domestic jurisdiction Article, but will also (and which is more important) examine these aspects as they relate to one another and to the understanding of the entire Article.

The second important deficiency in existing literature is that most authors have been content to merely lament the inherent ambiguities and contradictions posed by Article 2(7) without adequately relating this with the contemporary realities of the practice of international law and politics wherein lie the answers.

This study is significant in another way. Because the principle of domestic jurisdiction is in a state of flux, every new study represents an advance in the content and scope of the contemporary understanding of the principle in so far as it relates to the principle as currently understood. Where a similar study in the 1960's would address the cold war era and colonial questions as they related to Article 2(7), today's study apart from examining these, must inevitably address new global phenomena like the rise of American hegemony and the omnipotent over-intrusive character of the international financial institutions.

1.6 Methodology

The present study confronts the problem of Article 2(7) and its application from the perspective of past, present, and future. We investigate the origins of the domestic jurisdiction clause, analyse the interpretations that have been propounded and how these have been applied in practice and consider whether in the light of the practice, the Article retains its meaning and benefit to the community of nations both collectively and severally.

Accordingly, the study shall be inclined towards social impact research methodologies. The study will examine the working of Article 2(7) from formulation up to date focussing on its efficiency and effectiveness in conveying the intended meaning and in achieving the desired objectives.

There is an element of historical methodology in so far as the study will investigate and trace the origins of Article 2(7) in its predecessor Article 15(8) of the Covenant of the League of Nations and evaluate the transition from the latter to the former and the attendant consequences.

Inasmuch as I shall be considering the changes that the principle of domestic jurisdiction has undergone, as have the various concepts captured under Article 2(7), I shall also adopt some aspects of developmental methodology. This is so because we shall consider the principle as it was in the past, as it is now and how and why it is likely to change.

I shall also adopt evaluation methodology. I shall examine the operation of Article 2(7) focussing on its efficiency and effectiveness and make suggestions for its improvement on the basis of the investigation.

1.7 Literature Review

Writers and commentators have examined various problems related to Article 2(7). For the purposes of the present review, I shall divide the subject into the following topics: -

- On the Problem of Article 2(7).
- On the Genesis and History of Article 2(7).
- On the Meaning of "Matters Essentially within the domestic Jurisdiction of a State".
- On the Meaning of "Intervention".

- On the Competence to Interpret Article 2(7).
- On the International Financial Institutions and Article 2(7).
- Exit Law, Enter, Ideology, Power and Defiance.

What follows is a brief review of some of the available literature dealing with these topics.

Waldock[8] has traced the history of the domestic jurisdiction doctrine in international law across three main epochs; prior to the League of Nations, in the Covenant of the League of Nations and in the Charter of the United Nations Organization. He sees the reservation of matters of domestic jurisdiction in Article 2(7) of the Charter as having been given a deliberately much broader sweep than its predecessor.

Waldock's article is however only concerned with the domestic jurisdiction reservation from the perspective of its significance and validity as a plea before international legal tribunals. It does not deal with the reservation as a plea before the international political organs such as the Security Council or the General Assembly of the United Nations Organisation.

Brierly[9] wrote on the doctrine of matters of domestic jurisdiction quite early in the history of the advent of Article 15(8) of the Covenant of the League of Nations and his is a useful exposition of a phrase which as early as 1925 was already showing

8 C. H. M. Waldock, "The Plea of Domestic Jurisdiction Before International Legal Tribunals," *Australian Journal of International Law* (1974): 127.

9 Brierly, (1925).

signs of "becoming a new catchword capable of proving a great hindrance to the orderly development of international law".

Winfield[10] in an appropriately titled treatise explores the history of intervention in international law. He explains the doctrine, which is covered in "confused nomenclature" and deals with what he calls varieties of intervention. He argues that in spite of the perplexing vagueness which enshrouds the word, it may be used in three definite senses which he identifies as: internal intervention, punitive intervention and external intervention. According to him, his classification is exhaustive.

Winfield's treatise is deficient insofar as it restricts the meaning of the word to the interaction of states *inter se*. It does not make sufficient effort to direct itself to the affairs of international organizations *vis-à-vis* the jurisdiction of states which is the special sense in which we are concerned.

Wright[11] deals with the question whether discussion is intervention. The thrust of his article, which cites several precedents in which this question has arisen, is to answer the question in the negative. He argues that without full and free discussion in the organs of the United Nations, the Organization would be quite a different one from what was planned at San Francisco.

10 Winfield, (1922-3): 130.

11 Quincy R Wright, "Is Discussion Intervention?," *Australian Journal of International Law* Vol. 50, (1956).

The Mexico City Conference of the United Nations Special Committee on Principles of International Law was held in 1964 for the purpose of studying certain principles of international law with a view to their progressive development and codification. Luke T. Lee[12] has given a summary of the deliberations of the Conference. He asserts that the duty not to intervene in matters within the domestic jurisdiction of any state in accordance with the Charter was one of the principles upon which a consensus could not be arrived at.

Howell and Wilson[13] have researched on trends in the Commonwealth in relation to domestic jurisdiction clause. They see a measure of the effectiveness of the plea of domestic jurisdiction in the degree in which it bars an international organ from interfering in domestic affairs.

In his comprehensive article on the meaning of "intervention" within Article 2(7) of the United Nations Charter, Gilmour[14] takes time to deliberate on the meaning of the word "intervene" as employed in the Article.

Eagleton[15] has also attempted to define intervention. But he admits that there is a dearth of evidence as to the legal character of the rule of non-intervention. On this

12 Luke T Lee, "The Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States," *International Comparative Law Quarterly* Vol. 14, (1965).
13 J. M. Howell and R. R. Wilson, "The Commonwealth and Domestic Jurisdiction," *Australian Journal of International Law* Vol. 55 (1961).
14 Gilmour, (1967).
15 Eagleton, *International Government* (3rd Ed. Ronald Press Co., 1957): 83-84.

subject of intervention and non-intervention, he cites Hodge's[16] Doctrine of Intervention and Fenwick's[17] Intervention: individual and Collective, among others.

A number of the works already cited have devoted some attention to exploring the meaning of the phrase "matters essentially within the domestic jurisdiction of any state". According to Gilmour,[18] no one agrees on the present-day content of domestic jurisdiction.

Jones[19] in a well thought out work on the subject of the domestic jurisdiction of states has given some insight into the scope of the matters essentially within the domestic jurisdiction of a state.

He deals in ample detail with various aspects of Article 2(7) and provides a most useful discussion of United Nations' practice over the years in relation to the Article. The major shortcoming of this book is in failing to make any recommendations in relation to the future of Article 2(7).

Schwarzenberger[20] discusses the preparatory material of the San Francisco Conference and seeks to ascertain the intention of the states represented at the Conference in coining this expression.

16 H. G. Hodges, *Doctrine of Intervention* (Princeton, 1915).
17 C. G. Fenwick, "Intervention: Individual and Collective" *Australian Journal of International Law* Vol. 39 (1945).
18 Gilmour, (1967).
19 Goronwy J. Jones, *The United Nations and the Domestic Jurisdiction of States* (Cardiff: University of Wales Press, South Western Printers Ltd, 1979).
20 G. A. Schwarzenberger, *Manual of International Law* (5th Edn.) (London: Stevens and Sons Ltd, 1967).

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18 Gilmour, (1967).
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20 G. A. Schwarzenberger, *Manual of International Law* (5th Edn.) (London: Stevens and Sons Ltd, 1967).

Brownlie[21] has asserted that matters within the competence of states under general international law are said to be within the reserved domain, that is, the domestic jurisdiction of states. He however argues that this is a tautology and argues that as a source of confusion, the problem of domestic jurisdiction deserves careful consideration.

Wheaton[22] has traced the history of the drafting of Article 2(7) and asserts that in relation to the reserved domain, the sponsoring governments rejected the contention that the sphere of domestic jurisdiction should be defined in terms of international law.

According to Waldock[23], from one aspect, matters of domestic jurisdiction are those activities, which at any given moment are left by international law to the exclusive jurisdiction of a state. From another aspect, he says matters of domestic jurisdiction are those activities in regard to which at the given moment, international law does not subject the state in question to any international obligation vis-a-vis a state or international organization.

Gilmour[24] dwells more on the meaning of the term "intervene" as used in Article 2(7). But he acknowledges that many developments have taken place since the Charter was drafted and that the world political conditions, in light of which it was drawn up, have changed in fundamental respects. He contends that it is now

21 I. Brownlie, *Principles of Public International Law* (4th Edition) (Oxford: 1990).
22 Wheaton, *Digest of International Law Cases*.
23 Waldock, (1974).
24 Gilmour, (1967).

universally recognized that the scope of this concept is narrower today than it was in 1945 when the Charter was drawn up. Regrettably however, Gilmour says no more especially as to whether or not this is a desirable development.

Howell and Wilson[25] sound a very pessimistic view on the purposes of Article 2(7). To them, the most important consideration for the future would seem to be that a domestic jurisdiction reservation provides slight comfort to those who would maintain national sovereignty inviolate. They argue that perhaps it is time to recognize that international organs must exercise sufficient jurisdiction to attempt to solve the international problems of a troubled world.

We now consider some of the available literature on the question of who is to determine that a matter is or is not essentially within the domestic jurisdiction of a state for the purposes of the application of Article 2(7).

J. S. Bains[26] has lamented the fact that Article 2(7) of the UN Charter unlike its counterpart (Article 15(8)) in the League Covenant is not explicit on the point as to who would finally decide in case a party to a dispute questioned the jurisdiction of the United Nations to entertain such a dispute. He erects a spirited argument whose effect appears to be that the International Court of Justice should be the appropriate forum for such determination. He directs a lot of energy at controverting the view that any state can have the power to determine for itself that a matter is essentially one within its domestic jurisdiction.

25 Howell and Wilson, (1961).

He argues that the ICJ is fully competent to give an Advisory Opinion regarding Article 2(7) if duly approached for the purpose.

Luke T. Lee[27] commenting on the Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States opined that in view of the differences which emerged in the debates at the Special Committee on the meaning of the duty not to intervene in matters within the domestic jurisdiction of any state in accordance with the Charter, it would be appropriate for the General Assembly to request the International Court of Justice to give an advisory opinion in accordance with Article 96 (1) of the Charter.

Watson[28] in a very forceful article has argued that the power to make authoritative interpretations of Article 2(7) has never been yielded by states to the political organs of the United Nations and that there exists in the member states a power of auto interpretation. Watson's views are primarily positivistic in approach. To him this is an untenable position. Watson's article however makes no attempt to discuss the meaning and scope of Article 2(7).

Wheaton[29] quotes a report by the American delegation to their President on the results of the San Francisco Conference, which was prepared by the American delegation whose implication was that in their understanding Article 2(7) meant that

26 J. S. Bains, "Domestic Jurisdiction and the World Court," *Indian Journal of International Law*, 491.
27 Lee, (1965).

28 J. S. Watson, "Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter," *Australian Journal of International Law* (1977): 61.

every state would be free to determine for itself what matters fall within its domestic jurisdiction.

Jones[30] has a contrary view arguing that such a conclusion is absurd and not supportable by the records of the Conference.

Literature on the competence to determine the operation of Article 2(7) is surprisingly limited. This is so notwithstanding that there are two diametrically opposed views on the correct position: those acknowledging the competence of the United Nations organs to determine the matter, and those contesting such competence and holding the view that each state must be its own judge.

Available literature on the foregoing areas of concern is now quite dated. This is so because concerns about the meaning and scope of Article 2(7) were, as one would naturally expect, more intense in the earlier years of the history of the UN than today. Most of these concerns are now fairly settled by writers, and by precedents from UN practice.

Latter day literature on Article 2(7) now grapples more with application of the Article 2(7) principles to contemporary issues and problems.

Barry E. Carter[31] in his book "International Economic Sanctions" has given some treatment to international financial institutions. He explores the use by the United

29 Wheaton, *Digest of International Law Cases*.
30 Jones, (1979).

States of America of its clout in these financial institutions as a vehicle for the advancement of her foreign policy goals. He examines several case studies involving both specific countries and specific issues. He deals with the use by the United States of its influence in these institutions to achieve certain goals. This is despite the fact that these institutions being agencies of the United Nations are bound by the prohibitions of Article 2(7).

Renniger[32] has written on donor conditionalities imposed on countries by the IMF. He argues that it is quite wrong for anyone to argue against conditionality in principle. He argues that what may be contested is the form and character of the conditionalities applied, not the principle per se.

Andreas F. Lowenfeld [33] commenting on the role of the IMF vis-à-vis the principle of non-intervention says that when the major international organizations were established at the close of World War II, it was understood that matters "essentially within the domestic jurisdiction of any state" were not the concern of the international organizations or the international community. He writes that the IMF in particular was to focus on member states' balance of payments, exchange rates and exchange controls, but not their domestic policies or priorities. His essay does not condemn this erosion of sovereignty but points out that neither the member states nor the IMF have come up with a new theory to reflect the new reality, or reached

31 B. E Carter, *International Economic Sanctions, Improving the Haphazard U. S. Legal Regime* (Cambridge: University Press, 1988: 166).

32 John P Renniger, (Ed), *The Future Role of the UN in an Interdependent World* (Netherlands: Kluver Academic Publishers, 1989).

33 Andreas F. Lowenfeld, "The International Monetary System and the Erosion of Sovereignty," *Boston College International and Comparative Law Review*, Vol XXV No. 2, 2002).

agreement on where a new boundary may be set between national and international concerns.

Earl Conteh-Morgan[34] has discussed questions of conflict and intervention and what he calls the decline of the developing state. The overall objective of his paper is to utilize arguments and perspectives from theorists, world systems and analysts to show how developing states sovereignty is being assailed by various transnational developments.

Jones[35] in a Chapter titled "The Role of the UN and its Specialised Agencies in the Economic, Social and Related Fields with Special Reference to the Non-intervention Principle", contends that to a greater or lesser extent, the specialised agencies which have been brought into relationship with the United Nations through special agreements under Article 63 of the Charter possess more effective powers than the essentially recommendatory competence of the United Nations Assembly and the Economic and Social Council and gives many apt examples indicating the limitations on the domestic jurisdiction of states which membership of some of these institutions entail.

Dr. F. A. Mann[36] examines the issue of the interpretation of the constitutions of international financial organizations. The crux of this Article is to repudiate the

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34 Earl Conteh-Morgan, "Conflict, Intervention and the Decline of the Developing State" http://www.gmu.edu/academic/pcs/morgan.htm. (15th January 2004).

35 Jones, (1979): 22.

36 F. A. Mann, "The Interpretation of the Constitutions of International Financial Organizations," *British Year Book of International Law* (1968-69).

proposition that the interpretative decision of the Directors of the International Monetary Fund is final. He is also adamant that the powers of interpretation conferred by Article XVIII of the Articles of Agreement relate only to the interpretation of the provisions of the Articles of Agreement and do not extend to a decision on questions of fact or public international law.

If his views were to be accepted then it would somewhat mitigate the perceived conflict between the IMF and Article 2(7).

Many writers have addressed the issue of the receding nature of the province of matters essentially within the domestic jurisdiction of a state.

Goronwy J. Jones[37] says that although it was the evident intention of those who drafted Article 2(7) of the Charter that the United Nations should observe a strict policy of non-interference in matters traditionally regarded as within the domestic jurisdiction of states, from the handling of the General Assembly of various cases from 1946, it is clear that it has considered itself competent to adopt various procedures in a case of alleged violation of human rights, notwithstanding the claim of the accused state that such procedures contravened the principle of non-intervention in matters essentially within the domestic jurisdiction of states under Article 2(7) of the Charter.

37 Jones, (1979).

The principle of self-determination has been erected to diminish the province of matters essentially within the domestic jurisdiction of a state. According to Wright,[38] the inclusion of the principle of self determination in the Charter gave rise to legal rights, so that the colonial powers that signed the Charter could no longer claim that their policies relating to the political development of their colonial territories were matters essentially within their domestic jurisdiction to which the principle of non intervention under Article 2(7) was applicable. This argument and arguments to the contrary dominated the colonial questions before the United Nations especially during the 1960's when many African countries were fighting for their independence.

In peace-keeping operations, the province of matters essentially within the domestic jurisdiction of a state has further declined. Louis Sohn[39] in a thoroughly useful book has detailed ten cases of the United Nations practice in relation to peace-keeping operations. They range from the Palestine Question all the way to the Vietnam Question. What emerges from these cases is that the United Nations peace keeping operations at the invitation of the host state where such state is unable to contain the breakdown of law and order as happened in the Congo Question is not a form of prohibited intervention and such a state of affairs ceases to be a matter essentially within the domestic jurisdiction of that state.

38 Wright, (1956): 20.

39 L. B. Sohn, *The United Nations in Action: Ten Cases from United Nations* (Brooklyn: Foundation Press, 1968)

Commenting on the United Nations role in Congo during the Katanga crisis, Bowett[40] has argued that there is considerable doubt whether in a situation where there exists a threat to international peace, there is any justification for so general a reliance on the "domestic jurisdiction" limitation on the powers of the United Nations. According to him, any threat to international peace can never by definition be a purely domestic matter. As the more recent cases of internecine strife in Rwanda, Burundi and the Democratic Republic of Congo have demonstrated, it is possible to interpret the term "threat to international peace" quite broadly so that it becomes difficult to characterise some internal conflicts as purely domestic and others as otherwise.

Higgins[41] argues the problems such as prostitution and narcotics, once the sole concern of sovereign states but are now acknowledged to be matters of international concern To this of course must be added such issues as the treatment of wild animals and endangered species and issues of environmental protection. To her, given the mutable and developing nature of the concept of domestic jurisdiction, a flexible approach is desirable, based on the principle that states must be made responsible to the international community when their actions cause substantial international effects.

We may now review some existing literature on the employment of ideological standpoints, military and economic power and cases of outright defiance of the domestic jurisdiction Article.

40 D. W. Bowett, *United Nations Forces* (London, Stevens and Sons, 1964): 197.
41 Rosalyn Higgins, "The Legal Limits of The Use of Force by Sovereign States, United Nations Practice," *British Year Book of International Law* (Oxford University Press 1963).

Watson[42] argues that Article 2(7) has grossly been abused for ideological purposes so that it has taken on an almost supranational rather than international jurisdiction. He opines that Article 2(7) has been so frequently manipulated or ignored when it has suited certain powerful interests that the issue now is whether in interpreting the Article, we should adopt a dynamic, teleological approach with the emphasis placed on the goals of the United Nations or whether to maintain the position that the primary source of law is to remain in written documents interpreted in good faith and in accordance with accepted techniques of interpretation.

Kenneth J. Twitchett and Lord Caradon argue that since Article 2(7) does not operate to limit the powers of the Security Council, under Chapter VII it is possible for the Security Council led by the veto powers to infringe the Article. They argue that if the Security Council authorizes any action under Chapter VII that action will be taken notwithstanding that it is contrary to the rule of non-intervention. They argue that this was in fact the case when the Council gave express authorisation to ONUC, a UN Force to expel mercenaries during the Congo crises.

Verzijl[43] writing in 1968 lamented that an impartial assessment of the contradictory United Nations action or inaction proves convincingly that the commandment of the Charter that there shall be abstention from intervention in the domestic jurisdiction of Member states is increasingly losing its authority as a legal injunction and degenerating into a plaything of opportunist international policy. According to him

42 Watson, (1977): 61.
43 Verzijl J. H. W., International law in Historical Perspective, Vol 1, A.W. Sijthoff – Leyden, 1968.

when all is said and done, the application of Article 2(7) seems to "swing about with the political squalls".

Dr. Subhas C. Khare[44] in his book: "Use of Force under the UN Charter," has documented numerous cases of the use of military might in contravention and often times in defiance of Article 2(7). He cites the example in 1959 when during the Lebanese civil strife the U.S. sent her troops there under the pretext of safeguarding the lives and property of her nationals. Later in 1965 the U.S. again sent troops to intervene in the civil strife in the Dominican Republic to fight against the revolutionaries there. Other examples cited include Belgian intervention in the Congo Civil war, British armed intervention in Egypt in 1956, and U.S. action in Vietnam (1962 – 1972).

Jose E. Alvarez[45] in The "Right to be left Alone and the General Assembly" has summarised what he describes as "the legendary problems" with Article 2(7) and considers such contemporary issues as election monitoring, crimes against the peace and security of mankind, human rights, economic relations and space law in the context of Article 2(7).

Ruth Gordon[46] considers the role of the Security Council in the post cold war era. She argues that this era has seen a shift in state thinking in respect to Article 2(7) and

44 S. Khare, *Use of Force under UN Charter* (New Delhi: Metropolitan Book Co. Ltd. 1985).
45 Jose E. Alvarez, "The "Right to be Left Alone" and the General Assembly, (1992)" http://www.acun.wlu.ca/publications/2.7/2.7/intro.shtml. (15th January 2004).
46 Ruth Gordon, "Article 2(7) Revisited: The Post-Cold War Security Council, (1992)" http://www.acuns.wlu.ca.publications/2.7/2.7.Chapter 2.shtml. (15th January 2004).

that the conduct of the Security Council in recent years is testimony that states are more willing to consider humanitarian intervention even in the face of Article 2(7).

Andy Knight[47] has considered the changing human rights regime vis-à-vis state sovereignty and Article 2(7) in the context of the post cold war epoch. He argues it has to be agreed by all that individuals and groups within any state ought to be protected in some manner from the human rights abuses of other groups within any state, or from the state itself; and that outmoded conceptualisations of state sovereignty and some interpretations of the non-intervention principle of Article 2(7) of the UN Charter would eclipse what needs to be done.

Mark Malan[48] writing on the principle of non-interference and the future of multinational intervention in Africa challenges what he calls the "conventional wisdom on the sanctity of national sovereignty and the dogma of impartiality." He calls for a shift away from blind adherence to impartiality and an acceptance that both democratisation and development require a minimum degree of stability in order to succeed.

Ken Coates[49] in "Benign Imperialism Versus United Nations" has lamented the advent of latter day benign imperialism in which more powerful states have

47 Knight, W. A. "The Changing Human Rights Regime, State Sovereignty, and Article 2(7) in the Post-Cold War Era", http://www.acuns.wlu.ca/publications/2_7/knight/knight_part08.shtml (15th January 2004).

48 Mark Malan, "The Principle of Non-Interference and the future of Multinational Intervention in Africa, Africa Security Review, Vol 6 No. 3," (1997), http://www.iss.co.za/pubs/asr/6no3/malan.html. (15th January 2004).

49 Ken Coates, "Benign Imperialism Versus United Nations," (1999). http://www.russfound.org/consult1/papers1/benign-imperialism.htm. (15th January 2004).

purported to re-write international law on intervention especially when purporting to confront transgressions of human rights. He questions what would happen if there was a proliferation of such interventions by a multiplicity of states.

Coates' paper was written at the height of the NATO bombings in Yugoslavia. As matters turned out the situation he feared was later to be replayed in the US invasion and occupation of Iraq in 2003.

Coates' paper like so many others suffers from the deficiency that it does not propose how the new trend should be arrested.

Jim Whitman[50] explores the risks and deficiencies of unsanctioned humanitarian intervention in the light of the NATO action in Kosovo and protests that the declaration that NATO must not be subordinated to any other international body in defiance of international law is an invitation to other states and organizations to regard themselves similarly and act accordingly.

An interesting feature of a review of the existing literature on Article 2(7) is the North-South dichotomy of thought and focus. Firstly, the third world scholarship dissecting the meaning of Article 2(7) is scarce. Generally, such scholarship proceeds on the basis that the meaning of Article 2(7) is not in doubt and proceeds to analyze perceived violations of the principle of non-intervention.

50 Jim Whitman, "After Kosovo: The Risks and Deficiencies of Unsanctioned Humanitarian Intervention" http://www.jha.ac/articles/a062.htm (2000).

Writers from the North on the other hand tend to explore what was intended by Article 2(7) and generally tend to urge a broader and more evolutionary interpretation of the Article.

Not surprising, state conduct in the United Nations is along similar lines.

1.8 Hypotheses

I expect that the present study will reveal that Article 2(7) of the Charter is ambiguous and equivocal and is a source of great confusion and controversy. I expect that this study will elucidate the meaning of "intervention" as used in the Article as well as the meaning of "matters essentially within the domestic jurisdiction of a state".

I hypothesize that the study will find that Article 2(7) is deficient in so far as it does not set out the competent authority to make determinations on whether a particular matter is or is not essentially within the domestic jurisdiction.

I hope by considering the Charter in its entirety, the writings of scholars, and the practice of the various organs of the United Nations, to find that certain authoritative positions have with the benefit of five decades, emerged on each of these positions.

My findings will help to clarify for the student of international law and for every person who is interested in the workings of the United Nations, a primary principle of the Charter whose meaning and extent has always been controversial.

In the final analysis I hope that the proposals of this study will provide ample food for thought about the need to effect an amendment to this contentious Article.

1.9 Scope and Limitations

The present study aims at understanding the meaning and ramifications of the UN Charter Article 2(7). However, as no thesis can reasonably be expected to cover all or even most angles of a given problem, it is now necessary briefly to define and delimit the study.

This study is limited in scope in so far as we are concerned only with a single Article in a Charter consisting of 111 Articles. I acknowledge that a holistic consideration of the Charter would be the ideal in order to understand better the domestic jurisdiction Clause and to put it in perspective. I approach the study largely from a historical angle. I look at the history of the drafting of the Article with a view to considering what the intentions of the drafters of the Charter were in wording the Article in the way that they did.

I then consider whether these intentions so far as they can be ascertained, are manifested in the operation of the United Nations and if so, to what extent, and if not, I consider the new meaning which has been put to the Article by the practice of the United Nations over the years. Finally, I consider what changes might be considered to this Article in order to remedy the problems which it has caused.

The rationale for this restriction in scope is that, by and large, I do not consider most of the other Articles of the Charter to be directly relevant for an understanding of Article 2(7). Where such relevance is shown, I shall make every effort to consider those other Articles of the Charter. I apprehend also that a consideration of the Charter as a whole would encumber us with an unwieldy study and deviate from and obfuscate the primary issues of our concern.

Apart from the constriction in scope, there are also limitations of a conceptual and methodological nature, which will characterize the present study, which it is important to observe.

Firstly, the study focuses attention with regard to United Nations practice largely on experiences from various organs of the United Nations. This it must be conceded does not provide the full picture. In concentrating attention on the organs and institutions of the United Nations, sight is often lost of the fact that states also interact *inter se* (and perhaps more commonly so) otherwise than through the United Nations organs. It would be useful also to study in greater detail how states have approached the problems posed by Article 2(7) in their interactions outside the United Nations.

A domestic jurisdiction clause of some kind or other is to be found in the various regional organisations to which states are parties. It would be ideal in a study of this kind to make a comparative analysis of the equivalent provisions in the Constitutions of these Regional Organisations as well as in the practice of these organisations.

By basing the study not only on the provisions of the Charter but also on the decisions of the organs of the United Nations and its practice, we may be distorting to some extent or overplaying the role of precedents in international law. It is an undisputable fact that as a general proposition the decisions of the organs of the United Nations are not binding sources of law.

There are also conceptual limitations in a study, which seems to attempt to derive the meaning of legal provisions from the practice. Some scholars might argue that the legal position ought to be derived from the provisions of the Charter itself or from pronouncements of only the judicial and not the political organs of the United Nations. However it is my view that Article 2(7) is a mixture of law and politics. Also, to rely only on the pronouncements of the International Court of Justice, the judicial organ of the United Nations in seeking to understand a problem such as the one at hand would be to miss the point since in practice questions relating to Article 2(7) are often dealt with by the political organs of the United Nations without recourse to the Court.

With regard to the practice of the United Nations, this thesis is premised on the understanding that law does not operate in a vacuum and also that any law which has

no bearing on the practice on the ground is moribund and ought to be changed. The law and the practice must be brought into harmony.

1.10 Chapter Breakdown

This thesis is divided into the following Parts and Chapters.

PART I: A CRITIQUE OF ARTICLE 2(7)

Chapter 1 On the Problem of Article 2(7) and the Scope of the Study

Chapter 2 On the Genesis and History of Article 2(7).

Chapter 3 On the Meaning of Matters Essentially within the Domestic Jurisdiction of a State.

Chapter 4 On the Meaning of Intervention.

Chapter 5 On the Competence to Interpret Article 2(7).

PART II: SOME REFLECTIONS ON THE APPLICATION OF ARTICLE 2(7)

Chapter 6 On the International Financial Institutions and Article 2(7).

Chapter 7 Exit Law, Enter Ideology, Power and Defiance.

Epilogue

The matters to be covered under each of the aforesaid Chapters have already been explained.

CHAPTER 2

ON THE GENESIS AND HISTORY OF ARTICLE 2(7)

Under the entirely decentralized constitution of the international community before the establishment of the League of Nations the jurisdictional aspect of the doctrine of the reserved domain was of comparatively little significance. International jurisdiction in most cases consisted simply of diplomatic exchanges between the states concerned, in which each state was a judge in its own case.

Although arbitration was beginning to develop as a more or less regular institution of international law, for the greater part, states did not commit themselves in advance to submit their disputes to arbitration and where they did in a treaty of arbitration, they often added reservations excluding from the obligation to arbitrate any questions affecting "vital interests, independence and honour" or some such similar reservation.

The effect of this was that a state wishing to avoid arbitral proceedings in regard to a particular question had only to invoke the reservation of "vital interests, independence and honour" without having to rely specially on a reserved domain of matters of domestic jurisdiction.

It is argued that the present day idea of state sovereignty, and its corollary of non-intervention, have their roots in the Peace of Westphalia; the political compromise reached in the aftermath of the Reformation and wars of religion. The Peace of Westphalia came with the realization that no state could impose its own universal values (at the time synonymous with religion) on others. The principles of

territorial integrity and political sovereignty which have endured to the present day were the lynchpins of the Westphalian system.

2.1 The Advent of the Congress System

The general international background which obtained for almost forty years after the Napoleonic wars was shaped by the Vienna Settlement and the agreement of the great powers pursuant to the Treaty of Chaumont of 1814, on the holding of periodic congresses to consider the affairs of Europe and to deal with any matters which might disturb the peace[51].

The great powers which overthrew Napoleon consisted of Austria, Prussia, Britain and Russia. Their main object was to prevent a resurgence of French aggression without depriving France of "great power" status, and to create an equilibrium of power which would ensure the stability of Europe.

In pursuit of that object, various territorial adjustments were agreed upon culminating (with French concurrence) in the Treaty of Vienna of 1815.

The Congressional form of international government, the first experiment of its kind in the history of modern Europe can therefore be seen as having come into being to protect the public law of Europe.

Under the Congress System set up by the great powers the principle of non-intervention in the domestic affairs of states began to manifest. Castlereagh, Foreign Secretary of one of the great powers, Britain, insisted that the form of government within a state was a matter within its domestic jurisdiction and outside the international jurisdiction of the Congress system. Thus, when the Russian Tsar

51 Jones, (1979): 1.

sought to have a congress convened to mobilise a concerted great power intervention in Spain to put an end to the liberal constitution which had limited the power of the Spanish king in the revolution of 1820; Britain would not agree. Castlereagh declared –

> "In this Alliance as in all other human arrangements nothing is more likely to impair or even destroy its real utility than any attempt to push its duties and obligations beyond the sphere which its original conception and understood principles will warrant. .... It never was intended as an Union for the Government of the World or for the Superintendence of the internal affairs of other states."[52]

But even then, the principle of domestic jurisdiction was not always accepted without disputation. At the Congress of Laibach in 1821 for example, despite British protests, Metternich, the Austrian Chancellor was authorised to re-establish the absolutist regimes in Naples and Piedmont when the same had been overrun by democratic constitutions. On that occasion Castlereagh conceded the right of intervention by a state or states where their own immediate security, or essential interests are seriously endangered by the internal transactions of another State.[53]

He however emphasized that its application should always be an exception to the general rule of non-intervention since it could be justified only by extreme necessity[54].

At the Congress of Verona, the attention of the Congress was called to the French request (France had joined the great powers) for the support of the other great powers to restore order in Spain, where civil war had broken out between the Royalists and the Constitutionalists and to re-establish the Spanish king as

52 Jones, (1979): 1.
53 Jones, (1979): 2.
54 Jones, (1979): 3

absolute ruler. Despite the presentations of the British representative, the Continental great powers gave France their support and in 1823, France invaded Spain, abolished its liberal constitution and restored the absolutist status of the King.

The demise of the Congress System could not be too far off. As Canning, another British Foreign Secretary argued, intimately connected with the system of Europe, though it was, it could not follow that Britain was therefore called upon to mix itself on every occasion, in the concerns of the nations which surrounded it.

British antipathy to any further involvement in the Congress system was such that in 1824 Britain declined to be represented at a congress summoned to deal with the Greek revolt against Turkey and Spain's insurgent South American colonies. Instead, without consulting the other powers, Britain accorded belligerent status to the Greek rebels, itself a departure from the previous British policy of non-intervention in matters within the domestic jurisdiction of Turkey. This action hastened the collapse of the Congress System.

A meeting of the Congress at Petersburg in 1825 broke up due to disagreement by the four continental powers on account of dissension over the question of the Greek revolt against Turkey.

Jones argues that the failure of the Congress System came about because of great power disagreement over the measure of international jurisdiction which the Congress System should possess and the purpose for which it should be used, for it could not possibly function effectively so long as the great powers were at

variance over the principle of non-intervention in matters of domestic jurisdiction.[55]

2.2 The Aftermath of the Collapse of the Congress System

Hinsley[56] says that the failure of the Congress System marked not the end but the beginning of an age of collaboration between the Great Powers because they then fell back on the Congress System as it had been interpreted by Castlereagh; the essence of which was the notion of a body of great powers always ready to defend the established balance of power by combining against any state which was determined to disturb the existing territorial order.

The new system was the Concert of Europe which functioned mainly through *ad hoc* conferences and which was based on no formal instrument and whose proceedings were not regulated by any constitutional obligations.

In the era of the Concert of Europe, the great powers as far as possible attempted to maintain the status quo and on the whole observed the principle of non-intervention in matters within the domestic jurisdiction of states.

But there were difficulties still. Although the principle of non-intervention in the domestic affairs of a state was generally accepted, a growing number of statesmen felt that the principle could not be allowed to stand in the way of the advancement of the cause of human rights and social justice.

The true test of how far the Concert of Europe had advanced in international interaction was to come in the Hague Conference of 1899. The deliberations of

55 Jones, (1979): 22.
56 F. H. Hinsley, *Power and the Pursuit of Peace* (Cambridge: University Press, 1963): 199-200, 211-12.

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that Conference showed that many states were still quite reluctant to surrender matters of domestic jurisdiction to the control of an international body.

At the end the states had failed to reach an agreement on the limitation of national armaments and although agreement was reached to set up a Court of Arbitration, no state bound itself to report to the Court, there was no mechanism for bringing an unwilling state to arbitration and disputes involving the "honour and vital interests" of a state were expressly exempted from the Court's jurisdiction[57].

In these circumstances, each state remained the sole judge of whether it would submit to the Court, its disputes with other states. The time had not come and it was not to come until the world had suffered the First World War, when states were prepared to yield an adequate measure of their sovereignty to give an international body the necessary power to become an effective arbitral entity.

2.3 The League of Nations Era

As earlier observed the Covenant of the League of Nations set up domestic jurisdiction into a distinct doctrine of international constitutional law with the recognition that there existed a reserved domain of matters relating to states which are not in principle the subject of international jurisdiction. The Covenant established the League of Nations as a standing organization with compulsory jurisdiction for the conciliation of disputes likely to lead to a rupture.

However, surprisingly little attention was given to the scope of international jurisdiction during the drafting of the Covenant and, only the United States delegation fearful of hostility back home to a League endowed with power to intermeddle in such sensitive matters of United States domestic policy as tariffs

57 Hinsley. (1963)

and immigration, proposed that matters of domestic jurisdiction should be reserved from the conciliation conferred by Article 15 on the Council (or on the Assembly acting in place of the Council). It was at their behest that a new clause, paragraph 8 was added to Article 15.

Article 15 of the Covenant laid down the method of procedure to be applied to those "disputes likely to lead to a rapture" which, not having been submitted to arbitration or to judicial settlement, had in accordance with Article 12, to be submitted to inquiry by the Council. Paragraph 8 was in the following terms :-

Paragraph 8 of Article 15, Brierly says,[58] was not contained in the original draft of the Covenant, but was added in the course of the debates in the Commission of Nineteen, in the hope, apparently of allaying American apprehensions of foreign interference in domestic affairs.

The effect of the paragraph was to exclude the class of disputes to which it referred not from submission to or consideration by the Council, for without these the Council could not make the necessary finding as to the nature of the dispute, but from the power vested in the Council by Article 15 in the case of other disputes to make "a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto".

The paragraph excluded these disputes only from the quasi-coercive powers of the Council when acting under Article 15 and consequently from the provision for sanctions by which these powers were backed in Article 16.

58 Brierly, (1925).

However, it had no reference to any action of the League under Article 11, which declared the right of any Member state to bring to the attention of the Assembly or the Council any circumstance whatever affecting international relations which threatens to disturb international peace nor to any action under Article 19, under which the Assembly could advise the consideration of international conditions whose continuance might endanger the peace of the world.

However, under Articles 11 and 19 the League had to rely on conciliation and moral pressure. The League was not invested with powers to dictate a settlement of any dispute and there were no provisions for sanctions if its advice was disregarded.

Article 15(8) was a tremendous improvement on the archaic formula of "vital interests, independence and honour" ground in the general treaties of arbitration in the Pre-League era as it stated the reserved domain by reference to the objective criterion of international law instead of by the completely subjective phrases of the old formula.

In addition, it expressly placed the power of deciding whether the reservation applied in a particular case in the hands of the Council or the Assembly instead of leaving it to the less than impartial appreciation of the parties to the dispute. In short it is arguable that the domestic jurisdiction clause of the Covenant although only applicable to the conciliation jurisdiction of the Council or Assembly under Article 15 had all the makings of a genuine constitutional device limiting international intervention in matters reserved to states by international law.

In the League of Nations epoch, the level of the development of international relations was such that it was generally accepted that matters solely within the domestic jurisdiction of a state included its right to make private war permitted

under quasi-legal articles of the Covenant, the nature of its government, the size of its armaments and armed forces, the treatment of its own subjects, which covered the whole field of human rights except the treatment of minorities under the Minorities Treaties[59], questions of nationality, and economic policies such as the imposition of tariffs, quotas etc.

The scope of a state's domestic jurisdiction was therefore considerably wide and the purpose of Article 15(8) of the Covenant of the League of Nations was to prevent the Council from making recommendations for the settlement of disputes that arose out of matters which according to the contemporary criterion of international law were within the domestic jurisdiction of states.

How did the domestic jurisdiction limitation affect the capacity of the League of Nations to maintain international peace? According to Rajan[60]:

> "During the existence of the League, the domestic jurisdiction of Article 15(8) was tested in its forum in very few cases, though the issue of domestic jurisdiction cropped up many times in the course of debates in the League Assembly and in the Council, and in none of the disputes considered by the League Council did a state successfully, invoke the domestic jurisdiction provision of Article 15(8)".

2.4 The Charter of the United Nations

The challenge confronting the drafters of the Charter of the United Nations Organization at San Francisco in 1945 was to come up with the constitution of a special kind of international organization. The authority of this organization would depend upon the measure of national sovereignty which the nation-states

59 M. S. Rajan, *United Nations and Domestic Jurisdiction* (London, Asia Publishing House, Second Edition, 1961): 25.
60 Rajan, (1961).

particularly the great powers were willing to give up so as to furnish it with the necessary jurisdiction to effectuate the broad purposes it was intended to govern.

On the one hand, they had to formulate a constitution indicating the powers which the member states had to delegate to the new United Nations system. On the other hand, they had to ensure that the United Nations would not be empowered to intervene in matters which were to remain under the control or within the domestic jurisdiction of member states.

Prior to the San Francisco Conference negotiations had taken place in 1944 at Dumbarton Oaks near Washington DC in the United States of America to pave way for the Conference. These negotiations were by the four great powers namely the United States, Soviet Union, Great Britain and China.

Article 2(7) had its genesis in the domestic jurisdiction reservation included in the proposals for a general international organisation agreed to by those powers.

The domestic jurisdiction clause as set out in the Dumbarton Oaks proposals was intended to limit the authority of the proposed international organization in the peaceful settlement of situations or disputes arising out of matters solely within the domestic jurisdiction of a State. The clause was stipulated as paragraph 7 of section A in Chapter VIII of the Dumbarton Oaks proposals. It was preceded by six paragraphs setting out the procedure which was proposed to be followed by the Security Council and members of the Organization in resolving situations that might cause international friction and for the pacific settlement of disputes. Parties to a dispute, the continuance of which was likely to endanger international peace and security were required to submit he matter to the Security Council if they failed to find a solution through pacific means.

The paragraph proposed in the Dumbarton Oaks proposals gave international law as the yardstick for testing whether a dispute or situation arose out of a matter within the domestic jurisdiction of a state – in the same way as had Article 15(8). However unlike Article 15(8), the paragraph did not designate the authority which was to determine according to the criterion of international law that the situation or dispute was outside the international jurisdiction of the organization.

As a result of that omission, some suggested amendments to the original text agreed to by the four great powers. The major areas of concern were firstly whether to retain the international law criterion, and secondly, whether in a situation or dispute to be resolved through pacific settlement under Chapter VIII, Section A of the Dumbarton Oaks proposals, a state involved in the dispute should be able to decide the jurisdiction issue. It was decided that this object could be met by widening the domestic jurisdiction clause and substituting the word "essentially" in place of "solely" to describe domestic jurisdiction[61].

After a series of discussions and negotiations, the four great powers settled on a draft which came to be known as the sponsoring powers' amendment, which read:

> Nothing contained in this Charter shall authorize the organization to intervene in matters which are essentially within the domestic jurisdiction of the state concerned or shall require the members to submit such matters of settlement under this Charter; but this principle shall not prejudice the application of Chapter VIII, section B[62].

The draft was submitted to Committee I of Commission I for discussion.

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61 R. B. Russell and J. E. Muther, *A History of the United Nations Charter, The Role of the United States, 1940-45* (Washington DC, The Brookings Institution, 1958): 901-902.

62 UNCIO Documents 1945, Vol. 3, Document 215 1/1/10. (Documentation for Meetings of Committee I/1) May 11 1945, 567.

Dr. Evatt, the Australian delegate proposed an amendment to the sponsoring powers' amendment. He proposed that the words "but this principle shall not prejudice the application of Chapter VIII section B" be deleted and replaced with "but this principle shall not prejudice the application of enforcement measures under Chapter VIII Section B".

The contention of Australia was that as the sponsoring powers amendment stood, the phrase "Nothing contained in this Charter shall authorize the Organization to intervene in matters essentially within the domestic jurisdiction of any state or shall require members to submit such matters to settlement under this Charter" was defeated by the phrase "but this principle shall not prejudice the application of Chapter VIII Section B" in the rest of the paragraph.

This was so, Dr Evatt contended, because, since paragraph 2 of section B stated that in general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon measures to be taken to maintain or restore peace and security, the Council would still be able to recommend terms of a settlement with respect to a dispute arising out of a matter within the domestic jurisdiction of a state[63].

He said:

> "Such a provision is almost an invitation to use or threaten force in any dispute arising out of a matter of domestic jurisdiction in the hope of inducing the Security Council to extort concessions from the State that is threatened. Broadly, the exception cancels out the rule, whenever an aggressor threatens to use force. This freedom of action which international law has always recognized in matters of domestic jurisdiction becomes

[63] UNCIO Documents, Committee I/1 Verbatim Minutes of Eight Meeting, May 17, 1945, 29-31.

> subject to the full jurisdiction of the Security Council... The Australian delegation opposes the inclusion in the Charter of any provision which produces this result"[64].

After a series of discussions, the Australian amendment was approved by (31 votes to 3 with 5 delegates abstaining and 11 making no response) Committee I/1 with the consequence that the sponsoring powers' amendment was revised to read as follows:

> Nothing contained in this Charter shall authorize the Organization to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under this Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VIII, Section B.

This new text was submitted for discussion to the final meeting of Committee I/1. At this meeting, several amendments were proposed but none was carried. In the end the sponsoring powers amendment as modified by the Australian amendment was approved by Committee I/1 by 33 votes to 4 and was finally accepted by the Conference of San Francisco as Article 2(7) of the Charter.

So was born the *casus belli* Article which is the subject of this thesis.

[64] Document 969, 1/1/39, June 14, 1945 (Memorandum of Dr. H. V. Evatt on Behalf of the Australian Delegation), UNCIO, Vol. 6, 436-440.

CHAPTER 3

ON THE MEANING OF MATTERS ESSENTIALLY WITHIN THE DOMESTIC JURISDICTION OF A STATE

Article 2(7) forbids the United Nations from intervening in "matters essentially within the domestic jurisdiction of any state." What are these matters? Is it possible to classify which matters belong to this reserved domain? What was intended by this expression? How has this expression been interpreted? The purpose of the present Chapter is to interrogate these questions.

The problem, which we must grapple with in this Chapter, springs from the considerably changed phraseology of Article 2(7), which is ominously wanting in detail and clarity of terms. What change was intended to be achieved by this admittedly looser expression? Was the *raisson d'etre* and philosophy of Article 2(7) the same as that of its predecessor - Article 15(8) of the Covenant?

The drafters of the new Article made no effort to elucidate what was meant by the term " matters which are essentially within the domestic jurisdiction of any State" and thus threw open the floodgates of speculation about whether the expression "by international law" which had been removed from Article 15(8) was to be understood nonetheless to be implicitly retained.

At the outset, a subjective determination is required as to the degree of "domesticity" of an issue since only those matters which are "essentially" or primarily domestic are ousted. Also unclear is what meaning to give the word "domestic". Since nothing qualifies the word in terms of the permissible subjects of international law, we are not sure whether it means to make that distinction as opposed to others. Could it be that only those subjects that are primarily concerned

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with non-interstate relations - and are not the subjects of international relations - are "domestic", whether or not they are "covered" by international law?

Commenting upon the formula of Article 15(8), Brierly said:

> "There would seem to be two possible interpretations of the phrase "a matter which by international law is solely within the domestic jurisdiction of a state". Clearly no matter which is regulated by a rule of international law can be a matter solely of domestic jurisdiction; but it does not seem quite certain whether the converse of that proposition is true...."[65]

According to him, the Advisory Opinion of the Permanent Court of International Justice in the case of the Tunis and Morocco Nationality Decrees[66] (which came to identical conclusions) supported this interpretation.

In the Nottebohm Case[67] the International Court of Justice considered whether international law was disinterested in the question of nationality, which the Permanent Court of International Justice in the case of the Tunis and Morocco Nationality Decrees had held to be "in principle" a matter of domestic jurisdiction. It held that international law entered the matter at the point where two competing claims to naturalization had to be reconciled, since only when the conditions laid down for naturalization under international law were fulfilled was a third state obliged to give recognition to the naturalization.

It could be argued that although international law up to a point regulates naturalization, that area of law is still essentially a domestic concern. It is arguable therefore that naturalization being essentially a domestic concern, United Nations

65 Brierly, (1925).
66 P.C.I.J. Reports, Series B, No. 4
67 ICJ Reports (1955).

action may be excluded by virtue of Article 2(7) even in cases where the conditions laid down by international law have not been fulfilled.

It has been contended that if this is so, then the border line between domestic and non domestic matters under the Charter is not determined by reference to whether or not the matters in question are regulated by international law, and hence the interpretation of this Article differs from the interpretation of Article 15(8) of the Covenant. What then is the new interpretation? The debates in the United Nations are not testimony to universal agreement on the present day content of domestic jurisdiction.

According to Jones:

> "... it was the evident intention of those who drafted Article 2(7) of the charter that the United Nations should observe a strict policy of non-interference in matters traditionally regarded as within domestic jurisdiction of states, such as a state's form of government, the treatment of its own subjects, which covers the entire field of human rights; in the size of its national armaments and armed forces; internal conflicts within its territory; and its administration of non-self governing territories, if any, not placed under the trusteeship system of the United Nations"[68]

This demarcation is however deficient in so far as it does not take cognizance of the fact that even these matters traditionally regarded as within the domestic jurisdiction of states are dynamic and in the course of the development of international relations may change their character to become matters of international concern.

According to Schwarzenberger,[69] in the light of the preparatory material, there is little doubt on the intention of the states represented at the San Francisco

68 Jones, (1979).
69 Schwarzenberger, (1967).

Conference. It was, according to him, that in a generalized form, Paragraph 7 of Article 2 of the Charter would fulfil functions corresponding to those of Paragraph 8 of Article 15 in the Covenant. The United Nations was not to concern itself with matters essentially within the domestic jurisdiction of member and non- member states alike. Yet, the scope of such *ultra vires* matters was not intended to be settled once and for all. It was to be worked out empirically in a process of trial and error.

Some commentators argue that the "reserved domain" is that domain of state activities where the jurisdiction of the state is not bound by international law. From this perspective, the extent of this domain depends on international law and varies according to its development. This must be so, it is argued, because it is widely accepted that no subject is fixed in perpetuity within the reserved domain.

The principle of domestic jurisdiction is a basic manifestation of national sovereignty whose recognition was a necessary condition for the creation of a United Nations in 1945. The phrase "essentially" within the domestic jurisdiction, it is argued, was deliberately preferred to the older League of Nations phrase "solely" within domestic jurisdiction because in an inter-dependent world, there are few matters, which are "solely" within domestic jurisdiction. The use of the phrase "essentially" was sufficiently vague to enlarge the sphere of domestic jurisdiction and to preserve the sovereign rights of members.

Brownlie[70] has argued that the restriction on intervention was meant to be thoroughgoing hence the formula "essentially within" because of the wide implications of the economic and social provisions of the Charter (Chapter IX). According to him, these intentions have in practice worked against each other; with the flexibility of the provision and the assumption in practice that it does not

70 Brownlie, (1990): 291 – 295.

override other potentially conflicting provisions resulting in the erosion of the reservation of the domestic jurisdiction, although its draftsmen had intended its reinforcement.

The records of the San Francisco Conference show that:

> "Opinion was not united on the effect of the term "essentially" as compared with the phrase "solely by international law" contained into the Dumbarton Oaks proposals and in our treaties. Evatt (Minister of External Affairs of Australia) considered them equivalent, but Mr. Raestad (Norwegian Delegate) considered that the sphere of domestic jurisdiction was narrower under the formula "essentially" which was adopted in the Charter...
>
> Mr. John Foster Dulles undertook to interpret the Article as understood by the sponsoring governments in introducing this version. In rejecting the contention that the sphere of domestic jurisdiction should be defined in terms of international law, Mr. Dulles pointed out that international law was indefinite and subject to constant change, and that the scope of the sphere of domestic jurisdiction was subject to evolution".[71]

John Foster Dulles, senior adviser to the United States delegation defended the use of the word "essentially" on the ground that if the term "solely" were retained, the whole effect of the limitation on the authority of the United Nations would be destroyed. His argument was that although in the modern world matters of domestic jurisdiction were almost always bound to have some international repercussions or cause some international concern, this was no justification for saying that such matters should be outside the domestic jurisdiction of states.

Through the use of the term "essentially" then, it is apparent the United States delegation hoped to make the domestic jurisdiction prohibition apply to a much wider field of domestic matters, for though the General Assembly and the Economic and Social Council was essential to promote economic and social

71Wheaton, 331.

progress, and the implementation of human rights, they did not want those organs, in Dulles' words "to penetrate into the economic and social life of the member states".[72]

As to the question of including a reference to international law as the criterion for determination of the question whether or not a matter was one within the domestic or international jurisdiction, which several delegates had called for, Mr. Dulles dismissed this. He seemed to fear that its inclusion would lead to the erroneous belief that every subject dealt with by the United Nations would no longer be a matter of domestic jurisdiction and as the Charter would be a treaty, every matter dealt with by it would henceforth be under the ambit of international law (and therefore no longer a domestic matter) with the consequent danger that the whole purpose of the principle of non-intervention would be done away with!

This interpretation was borne out by the report by the American delegation to their President on the results of the San Francisco Conference. The report said rather inconsistently, on the one hand, that international law was not a sufficiently definite standard, but later on implied that there was need for a more flexible standard which was supplied by the term "essentially".

The report of the American delegation said of Article 2(7) that the text omitted the reference to "international law' found in the Dumbarton Oaks proposals as the test whether or not a matter is "domestic" because of the argument that the body of international law on this matter was indefinite and inadequate. It argued that the extent that the matter was dealt with by international practice and by text writers, the conceptions were antiquated and not of a character which ought to be frozen into the new Organization.

72UNCIO Documents Committee I/1,Verbatim minutes of Seventeenth Meeting, June 14th 1945, Running Number 4 as quoted in Jones, (1979): 20.

Preuss[73] sums up the problem created by the new dicta of Article 2(7) as having given birth to a formula which left everyone free to place his own interpretation upon the article in the future in the hope that he would make it prevail. Far from representing a definite concept which would be a clear guide for future action and which would resolve conflicts in this very delicate field of international action, he asserts that the adoption of Article 2(7) merely postponed the division of opinion which would be certain to arise in the future.

In practice differences on the meaning of the expression "matters essentially within the domestic jurisdiction" have been many and have mainly involved the Security Council and the General Assembly. Questions which have arisen have included whether a matter governed by international law can be within the reserved domain, whether a matter under the United Nations Charter can be within the reserved domain, as well as questions relating to Charter provisions on human rights, self determination and maintenance of peace.

3.1 Matters Governed by International Law

With regard to the question whether a matter governed by international law can be within the reserved domain, the Advisory Opinion of the International Court of Justice on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania[74] though wider in scope is germane.

In this case, the General Assembly requested an Advisory Opinion on the observance of human rights and fundamental rights in the three states. It was

[73] Lawrence Preuss, Statement of 12th July, 1945,Hearings before a subcommittee of the Committee of Foreign Relations, United States Senate, On S. Res. 196, *A Resolution Proposing Acceptance of Compulsory Jurisdiction of the ICJ by the United States Government.*

[74] I.C.J Reports (1950): 65.

objected that this action was *ultra vires* the Assembly because it constituted an "intervention" within the meaning of Article 2(7).

The Court held that the interpretation of the terms of a treaty, could not be considered as a question essentially within the domestic jurisdiction because it is a question on the interpretation of international law, which by its very nature lies within the competence of the Court.

In the debates in the United Nations, there has been a division of opinion on the subject whether or not a matter "essentially within domestic jurisdiction" can be removed from the reserved area by becoming subject to a treaty obligation. One opinion generalizes from the principle relied by the Court; the other relies on an extended interpretation of the word " essentially".

It is argued that the Charter itself is a treaty, yet domestic jurisdiction is reserved, and that even though a treaty creates international obligation, it does so only between signatories and the matter remains essentially domestic[75].

It has been contended that the mere fact that a matter is dealt with by the Charter places it outside the reserved domain. It is pointed out that the Charter is a treaty; that Article 10 indicates that Article 2(7) does not limit the power of the General Assembly to take action "on any matters within the scope of the Charter"; and that if it had been intended that Article 2(7) should nullify express provisions of the Charter, it would have read "Notwithstanding the provisions" instead of "Nothing contained in the Charter". However, the more accepted interpretation seems to be that the word "nothing" implies that only those provisions of the Charter imposing specific obligations withdraw matters from the reserved domain.

75 I.C.J Reports (1950): 139, 141.

3.2 Questions relating to Charter Provisions on Human Rights

On questions relating to Charter provisions on human rights, some interpreters of the Charter have asserted that signatories to the Charter accepted legal obligations with respect to the implementation of human rights. But according to Goronwy Jones[76], while it is true that the revulsion produced by the Nazi violations of basic human rights had created a climate of opinion which impelled the drafters of the Charter to require its signatories to pledge themselves to take joint and separate action in cooperation with the United Nations to promote respect for and observance of human rights under Article 56, there had been no attempt to define such rights and the measures necessary for their implementation.

He reiterates that this was not embarked on until after the birth of the United Nations when the UN Commission on Human Rights began its work in 1947, and until states have accepted precise legal obligations with respect to such matters through the ratification of international conventions, it is difficult to see how it can be maintained that human rights and fundamental freedoms, as well as economic and social matters not regulated by inter-state treaties, are not within the domestic jurisdiction of states.

He concludes by lamenting that although in his view it was the evident intention of those who drafted the Charter that the United Nations should not interfere in questions involving a state's treatment of its own subjects, which covers the entire field of human rights, in many cases of alleged human rights violations United Nations organs have not observed this general principle of non-interference and have brushed aside claims made by states that they have not accepted legal obligations in respect of the human rights which they have been accused of violating.

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[76] Jones (1979): 17

Clearly, Article 2(7) delimits the extent of UN intervention and reduces the range of possible issues that can be referred to the UN for resolution. Yet Article 2(7) as we shall see in Part II of this thesis has not prevented the UN from intervening in every matter that is of a "domestic" nature even though most states have opted to interpret it that way.

The following accounts of UN practice are illuminating on the attitude of the Organization to the meaning of "matters essentially within the domestic jurisdiction of a state"

At its first session in 1946 the General Assembly had to deal with the question whether an alleged violation of human rights by a state of her subjects could be claimed as a matter essentially within the domestic jurisdiction of that state. This was in the Question of The Treatment of People of Indian Origin in the Union of South Africa.

India complained that the South African government enacted discriminatory measures restricting South Africans of Indian origin in regard to trade and residence in violation of the principle of the Charter concerning human rights and that since South Africa had refused to settle the question by amicable means, a situation had arisen which was likely to impair friendly relations between the two states and India had thus resolved to submit the matter for consideration by the General Assembly in accordance with Articles 10 and 14 of the Charter.

Article 10 provides as follows:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in

> Article 12, may make recommendations to the Members of the United Nations or to the Security Council or both on such questions or matters."

Article 14 on the other hand provides as follows:

> "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations."

South Africa contested the competence of the Assembly under these Articles arguing that the question arose out of a matter essentially within the domestic jurisdiction of South Africa and that accordingly, to the principle of non-intervention under Article 2(7) precluded the General Assembly from considering the matter. The Assembly decided to discuss the matter and later approved a resolution expressing the opinion that the treatment of People of Indian origin in South African should be in conformity with the relevant provisions of the Charter.

This matter came up over and over again between 1946 and 1950 and from the General Assembly's handling of the matter, it emerges that the Assembly considered itself competent to adopt various procedures in a case of alleged violation of human rights notwithstanding the claim of the accused state that such procedure contravened the principle of non-intervention in matters essentially within the domestic jurisdiction of states under Article 2(7).

These procedures included placing the question on its agenda, discussing it, and making recommendations for its pacific settlement. The Assembly justified its competence by implying in its resolutions that the human rights question being dealt with was not a matter essentially within the domestic jurisdiction of South Africa on the grounds inter alia that:

(a) The human rights provisions of the Charter and the Universal Declaration of Human Rights imposed obligations on a member state of the United Nations to observe certain standards of conduct in the treatment of its nationals without discrimination as to race, sex, language or religion.

(b) The situation caused by the South African governments discriminatory measures against minority groups under its rule impaired inter-state relations.

South Africa found herself citing Article 2(7) again in 1952 when several Asian and African states requested that the Question of Race Conflict in South Africa resulting from the Policies of Apartheid of the Government of the Union of South Africa be placed on the agenda of the Assembly. Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria and Yemen in a memorandum alleged that policies of racial segregation in South Africa were causing an inflammatory situation, which constituted a threat to international peace and a flagrant violation of the principles of human rights and fundamental freedoms laid down in the Charter.

South Africa protested with the support of Australia, France, New Zealand and the United Kingdom that (among other objectives) the pledge of international co-operation in Articles 56 to promote respect for observance of human rights did not authorize any interference by the United Nations and that the matters in issue were essentially within the domestic jurisdiction of South Africa. The Assembly voted to place the matter on its agenda considered it and passed resolutions thereon.

One resolution established a Commission to study the racial situation in South Africa in the light of the purposes and principles of the Charter, with due regard to

Articles 2(7) and 56 of the Charter and the resolutions of the United Nations on racial persecution and discrimination and to report to the General Assembly[77]

Throughout its tenure, the Commission appointed by the Assembly presented reports adverse to South Africa. However, South Africa maintained that the Assembly was not competent to discuss the matter arguing that it was essentially within the domestic jurisdiction. In no instance was this contention upheld by the Assembly.

This would seem to suggest that the Members were of the view that issues of violation of human rights were not protected from international scrutiny by Article 2(7) or that notwithstanding the legal position and the intention of the drafters of the Charter, Members were not prepared to allow South Africa to hide behind Article 2(7). The latter seems the more likely position since an attempt by several Members in 1947 to refer the question to the International Court of Justice for an advisory opinion was rejected.

As transpired in later years, the General Assembly was to recommend economic sanctions against South Africa because of her refusal to heed to resolutions urging her to jettison her policy of apartheid. There seems to have been a fear that there was a danger that the International Court of Justice could give a legalistic advisory opinion, which could be adverse to the sentiments of world opinion on apartheid.

The Question of Tibet[78] also brought into focus the relationship between Article 2(7) and allegations of violations of human rights. The General Assembly was confronted with claims that China was depriving the Tibetan peoples of their fundamental freedoms and human rights. The issue arose whether Tibet was a state or whether Tibet was an integral part of China in which case a claim of

77 GA Res., 616A (VII), 5 December, 1952.
78 GAOR, 14th session.

domestic jurisdiction could be put forth by China. China and the communist block asserted that Tibet was part of China, a contention repudiated by a majority of the others. The most interesting contention was that of some, like Malaya and El Salvador who argued that the status of Tibet was irrelevant to the jurisdiction of the United Nations in this matter, this being a matter concerning human rights.

The General Assembly placed the matter on its agenda, discussed it and passed a resolution[79] calling for the restoration of human rights to Tibet as set out in the Charter of the United Nations.

3.3 Matters of International Concern and Treaty Obligations

In the Spanish situation in 1946, Poland referring to Articles 33 and 34 of the Charter expressed the view that the continuation in power of a fascist regime in Spain had caused international friction and endangered international peace and security. The Polish representative presented the Security Council with a draft resolution by which member states would sever diplomatic relations with the Franco Government in accordance with Articles 39 and 41 of the Charter[80].

Some members, who argued that the nature of a governing regime in a state is generally a question recognized to be within the domestic jurisdiction of the state, opposed the resolution. They argued that the Franco regime could not be said to constitute a threat to the peace or to have perpetrated a breach of the peace or an aggression as contemplated by Article 39 so as to permit the Security Council to order sanctions, free from considerations of domestic jurisdiction.

Australia contended that although the form of government was *prima facie* a matter of domestic jurisdiction, this presumption could be displaced if a threat to

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79 GA Res., 1353 (XIV).
80 SCOR, 1st year, 1st ser, suppl. 2, 167 ann. 3b (s/34).

the peace was shown, Australia therefore submitted a resolution to establish a sub-committee to determine whether the Spanish situation had led to international friction and endangered international peace and if so, to recommend the necessary action to be taken by the United Nations, the resolution was adopted.[81] The sub-committee reported *inter alia* as follows:

> "The allegations against the Franco regime involve matters which travel far beyond domestic jurisdiction and which concern the maintenance of international peace and security and the smooth and efficient working of the United Nations as the instrument mainly responsible for performing this duty".[82]

The report supported the view which would recommend the termination by members of their diplomatic relations with Spain if the Franco regime were not withdrawn.[83] Netherlands and the United Kingdom while denying that the continuation of the situation in Spain was likely to endanger international peace still thought the matter fell within Spain's domestic jurisdiction in the face of Article 2(7).

However, the contrary view prevailed. The idea had (already) taken root that matters *prima facie* of domestic jurisdiction may be of international concern in certain circumstances. When the matter came up in the General Assembly, the Assembly had before it a resolution similar to that of the Security Council's sub-committee. Panama, among others affirmed its belief that situations which represented a potential danger to world peace are essentially within international jurisdiction. The resolution was adopted.[84]

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81 SCOR, 1st yr, 1st ser., No.2, 39th,mtg, 245.
82 SCOR, 1st yr, 1st ser., No.2, 39th,mtg, 245. Spec. Suppl., 1 and 2, para. 4.
83 SCOR, 1st yr, 1st ser., No.2, 39th,mtg, 245. Spec. Suppl., 10, para. 28 and 11. para.31.
84 Res., 39(1) GAOR, 1st sess. Ad Hoc Pol. Cttee., 262.

It can be seen from the handling of this matter that notwithstanding the wording of Article 2(7) and the intentions of the drafters, in just two years, after the adoption of the UN Charter, there was beginning to sprout a concept of "international concern" with the aim or effect of limiting the definition of matters essentially within the domestic jurisdiction. Delegates of various states proceeded in subsequent questions to assume that matters of domestic jurisdiction could be defined as those matters, which were not of international concern.[85] But of course, this begs the question as to what matters are of "international concern".

The following year, 1948, Chile requested that a question involving the alleged denial of basic rights of Soviet wives of foreign citizens be placed on the agenda of the General Assembly. It was entitled: *The Violation by the Soviet Socialist Republics of Fundamental Human Rights, Traditional Diplomatic Practices, and other Principles of the Charter.*[86]

Chile complained that measures taken by the USSR to prevent Soviet wives, including the daughter-in-law of the former Chilean ambassador in Moscow, from leaving Russia to join their husbands abroad, constituted violations of the human rights Articles of the Charter as well as traditional diplomatic practices. Chile sought a resolution of the Assembly to recommend the withdrawal of the measures complained of. Australia on the other hand brought a draft resolution calling for an advisory opinion from the International Court of Justice on whether the measures complained of were a breach of international law.

The Soviet Union denied the claims of Chile arguing that the granting of exit visas and marriage legislation were matters of domestic jurisdiction and could not be dealt with without violating Article 2(7) of the Charter.

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[85] GAOR, 3rd sess, pt. 2 Gen Cttee, 17.
[86] *Yearbook of the United Nations*, (1948-49): 21-27.

The Australian draft resolution was defeated showing that members were not prepared to seek a legal opinion on whether or not the matter was essentially within the domestic jurisdiction of the Soviet Union. Invoking the human rights articles of the Charter and Articles 13 and 16 of the Universal Declaration of Human Rights among other international documents, the General Assembly declared that:

> "the measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad are not in conformity with the Charter and that when those measures refer to the wives of persons belonging to diplomatic missions, or of members of their families or retinue, they are contrary to courtesy, to diplomatic practices and to the principle of reciprocity, and are likely to impair friendly relations among nations".[87]

The Assembly recommended that the government of the USSR do withdraw the measures which it had taken to prevent Soviet wives from leaving Russia to join their husbands abroad.

From this case, it would appear that the principle was being put forth that no matter could be said to be essentially within the domestic jurisdiction of the State if it went against provisions of the Charter.

The argument has sometimes been erected that a matter is not essentially within the domestic jurisdiction and the UN is competent to act in a matter where treaty rights and duties are involved. In the Nationality Decrees Case,[88] the Permanent Court of International Justice stated:

> "It may well happen that, in a matter which is not in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which

87 *Yearbook of the United Nations*, (1948-49): 21-27.
88 P. C. I. J, B4, 24.

it may have undertaken towards other states and the dispute as to the question whether a state has or has not the right to take certain measures becomes in the circumstances a dispute of an international character."

To this argument, the question must be asked how the existence of a treaty could provide the United Nations with jurisdiction in a matter which would otherwise be essentially domestic when it is a cardinal maxim of international law that obligations can only exist as between the states parties to a treaty in issue and not in relation to a third party which the United Nations would then be.

According to Higgins,[89] in the United Nations practice, the strength of the implied support to be found for the claim that the United Nations may always act where treaty rights and duties are involved seems to outweigh the more negative evidence to the contrary. She cites as enhancing this position, the Advisory opinion of the International Court of Justice in the Interpretation of Peace Treaties Case,[90] which considered a contention erected on the basis of Article 2(7) that neither the Court nor the General Assembly had jurisdiction to examine the case. The Court found that for the purpose of obtaining clarification regarding the applicability of certain methods for settling disputes provided for in the treaties, the interpretation of the terms of a treaty could not be considered as a question essentially within the domestic jurisdiction of a state. It is a question of international law, which by its very nature, is within the competence of the Court.

89 Higgins, (1963).
90 ICJ Reports (1950).

3.4 Colonial Questions Claimed as Matters of Domestic Jurisdiction.

The United Nations Charter has three Chapters dealing with dependent territories: Chapter XI (Declaration Regarding Non-self-governing Territories), Chapter XII (International Trusteeship System) and Chapter XIII (The Trusteeship Council).

The basic objectives of trusteeship system are set out at Article 76 of the Charter while Article 77 details the territories to which the Trusteeship system was to apply.

The functions of the United Nations in respect of trusteeship agreements were vested in the General Assembly and the Trusteeship Council under the authority of the General Assembly. A supervision system was established under which the administering powers had to abide by the terms of the trusteeship agreement. Similarly, Article 87 empowers the General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions to -

(a) Consider reports submitted by the administering authority

(b) Accept petitions and examine them in consultation with the administering authority.

(c) Provide for periodic visits to the respective trust territories at the time, agreed upon with the administering authority; and

(d) Take these and other actions in conformity with the terms of the trusteeship agreements.

Because of these legal obligations in the administration of trust territories administering powers could not claim that the policies and the legislation, which they prosecuted in those territories, were matters essentially within their domestic jurisdiction.

Could the same be said of those states administering territories which were not self-governing but which were not placed under the trusteeship system?

Some writers have advanced the view that Article 73 (Declaration regarding non-self governing territories) did not require the colonial powers to accept the international supervision machinery of the trusteeship system; their legal obligation was limited under clause (e) of the Article to transmission to the Secretary General for information purposes only, of certain statistical and other information of a technical nature relating to economic, social and educational conditions in their colonial territories. This would be subject to such limitation as security and constitutional considerations might require.

The view proceeds that the colonial powers were not legally obligated to transmit to the Secretary-General information of a political nature indicating the development of self-government within their colonies and in view of this, their promise under Article 73(b) – to develop self government to take due account of the political aspiration of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement – was essentially a moral, not a legal obligation.

In the 1950s and 60s the question of whether the conduct of colonial administrations was a matter essentially within the domestic jurisdiction of the colonial power concerned was frequently dealt with by the United Nations.

There were broadly speaking two main positions.

The colonial powers canvassed the position that Article 2(7) was applicable to the manner in which they administered those non-self-governing territories not placed under the United Nations trusteeship system. They argued that Article 73(b) was merely a recital of general principles and that they could interpret these principles in the way they deemed fit.

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The colonial powers advanced the position that their only legal obligation was in relation to Article 73(e) requiring the transmission to the Secretary-General of certain types of information.

The anti-colonialist forces who sought to repudiate the application of Article 2(7) mainly relied on Article 1(2) and Article 55 of the Charter.

Article 1(2) under Chapter 1 on Purposes and Principles of the United Nations provides as a purpose of the United Nations:

> "To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace."

Article 55 relating to international economic and social cooperation requires the United Nations to take action:

> "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples..."

The dispute between the two sides mainly revolves around a few questions, which the charter is fairly vague about. These questions are:

a) What is meant by self-determination? Is self-determination synonymous with independence?
b) Who is eligible to invoke the principle of self-determination and in what circumstances?
c) Does the Charter impose obligations with regard to the exercise of the right to self-determination?

The Charter does not answer these questions and hence the controversy about the relationship of the principle of self-determination vis-à-vis that of non-intervention.

During the drafting of the Charter queries were raised about the need for the clarification of some of these matters. It had been agreed that the chairman and Rapporteur of Committee I/1 be asked for a clear interpretation.[91] However, this was not done and Article 1(2) and Article 55 were approved for inclusion in the Charter without any elucidation of the principle of equal rights and self-determination of peoples. This set the stage for the many disputes which were later to occur a few of which we shall now consider.

In the Indonesian Affair, the Security Council was informed that British authorities had employed force to suppress the Indonesian nationalist movement. It was argued among other things that the action of Britain was a violation of the principle of self-determination under Article 1(2) of the Charter.

Britain protested that the Netherlands was the sovereign territory in the region and the principle of self-determination could not apply because Indonesia was a non-self governing territory under Chapter XI of the Charter. Britain and the Netherlands contended that the Security Council was not competent to deal with the matter because the situation in the territory was a matter essentially within the domestic jurisdiction of the Netherlands.

This dispute was the subject of protracted attention from 1946 up to November 1949 when the Netherlands Government eventually transferred complete sovereignty over Indonesia to what came to be known as the Republic of the

[91] UNCIO Coordination Committee, Verbatim Minutes of Twenty Second Meeting, June 15, 1945.

United States of Indonesia. It is instructive however that at no point did the contention of the Netherlands based on Article 2(7) hold sway in any of the organs of the United Nations.

In the Question of Morocco,[92] a complaint was brought alleging the violation of principles of the Charter and of the Declaration of Human Rights, by France in Morocco. On the first occasion in October 1951 the attempt to have this matter placed on the agenda of the General Assembly was not successful. A second attempt in 1952 on substantially similar grounds resulted in the inclusion of the question on the agenda of the Assembly without discussion.

France asserted that the Question of Morocco was essentially within the domestic jurisdiction of France and that the organs of the United Nations were accordingly incompetent in the matter.

The United Kingdom urged in support of France that as Morocco was recognized as a non-self governing territory under Article 73 of the Charter, the only obligation incumbent on France was to transmit information on economic, social and educational conditions in Morocco under clause (e) of that Article.

The anti-colonial forces in the Assembly disputed these contentions on the basis that since France had (as indeed all other administering powers) undertaken to ensure the political advancement of the people of Morocco under Article 73(a), the situation in Morocco could not be a matter essentially within the domestic jurisdiction of France but rather within the purview of the Assembly's competence to take measures for the solution of the Question in accordance with the principle of equal rights and self-determination under Article 1(2) of the Charter.

92 *Year Book of the United Nations*, (1952): 278-285.

The Assembly passed a resolution[93] among other things, expressing :

> "the confidence that, in pursuance of its proclaimed policies, the Government of France will endeavour to further the fundamental liberties of the people of Morocco in conformity with the Purposes and Principles of the Charter."

This resolution, though admittedly lacking in "sting" was evidence that the majority of members believed that the right of self-determination overrode the prohibition at Article 2(7).

In the Question of Tunisia[94] and the Question of Algeria[95], which Questions both involved the treatment by France of her colonies, similar debates ensued with much the same results. The failure of the Assembly to come up with more direct and forceful recommendations notwithstanding, the position was getting firmly entrenched that the agitation for independence by colonized peoples could not be tucked away on the pretext of Article 2(7).

This position was further fortified by the entry into the membership of the United Nations of Guinea, Jordan, Ghana, Laos, Libya, Nepal, Malaysia, Khmer Republic, Sri Lanka, Morocco and Sudan, Congo, Mali, Niger, Somalia, Central African Republic, Cameroon, Chad, Dahomey, Gabon, Ivory Coast, Madagascar, Nigeria, Senegal and Togo between 1955 and 1960.

These African and Asian countries, which had just shaken off the yoke of colonialism, became very vociferous in the General Assembly in their insistence that the principle of self-determination was a legal right against which Article 2(7) could afford no cover. The nature of the General Assembly is that it is the

93 GA Res. 612 (VII) 19th December, 1952.

94 *Year Book of the United Nations*, (1952): 266.
95 *Year Book of the United Nations*, (1952): 65-69.

democratic platform of the world where even the poorest and smallest member of the United Nations has an equal vote.

Accordingly, whatever may have been the intention of the drafters of the Charter in drafting Article 1(2), Article 5 and Article 2(7), and the view of the majority of members of the UN about the interplay of these Articles would become the law.

The turning point in the history of the debate on the application of Article 2(7) in colonial questions was the Declaration on the Granting of Independence to Colonial Countries and Peoples approved by the General Assembly on 14th December 1960.[96] The Declaration was passed without a single dissenting voice, but with the main colonial powers abstaining. The declaration provided *inter alia* that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservation in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

After this Declaration, it was clearly the position of the Assembly that only complete independence was consistent with the principle of self-determination and that conduct inimical to the realization of this right justified the intervention of the United Nations without offending Article 2(7).

96 GA Res.1514 (XV) 14 December 1960.

These developments lead us to a very interesting conclusion with regard to the meaning of the term "matters essentially within the domestic jurisdiction." The conclusion is that so flexible is the interpretation by the United Nations about the prohibition of Article 2(7) that even what was clearly the intention of the drafters has been disregarded and the opposite intention adopted as the correct position.

The colonial powers which participated in the drafting of the Charter argued that Article 73 of the Charter had been intended to limit their obligation to transmitting to the Secretary-General certain types of information for the purposes only of keeping him posted on developments.

They had intended that the timing and procedures for the granting of independence to non-self-governing territories under their administration would be matters essentially within their domestic jurisdiction to which the principle of non-intervention – which they understood to mean non-interference in any form, applied.

> The history of the United Nations has demonstrated that the main political organs of the Organization have rejected these assumptions. Both the Security Council and the Assembly have generally disregarded the intentions of those who drafted the Charter (if those were indeed their intentions) and the accepted rule that colonial questions were solely within the domestic jurisdiction of the administering powers unless governed by specific international treaties. Instead they took the view that provided resolutions were supported by the requisite majority vote, in accordance with the voting procedures laid down in the Charter, they were competent to determine whether or not the domestic jurisdiction reservation was applicable to colonial questions. The consequence has been that variable political factors have generally outweighed legal factors in the

determination of resolutions by both the Security Council and the Assembly.

3.5 Conclusion.

In concluding this Chapter therefore, we must pose the question again: What therefore is meant by the term "matters essentially within the domestic jurisdiction of a state?" What matters are essentially within the domestic jurisdiction of states?

We draw the conclusion that, the only correct and accurate answer is that: a matter is essentially within the domestic jurisdiction of a state only if a political organ of the United Nations has not determined to the contrary.

This is perhaps what Higgins means by saying:

> "It is therefore necessary neither to insist that the bald words of Article 2(7) be interpreted literally and in accordance with the tenets of international law as they were understood in the early 1940's, nor to insist that Article 2(7) is a "dead letter" and "most conspicuous in its breach". The truth probably lies somewhere between these two extremes – the principle of domestic jurisdiction was meant to be, and is, subject to evolution in accordance with this development of international relations.[97]"

In the end, we are constrained to agree with Norman D. Harper[98] who said that the construction of the phrase "essentially" is no work for the layman. Juridical interpretations, he argues, give little indication of the meaning of the phrase since both the General Assembly and the Security Council have ignored the intentions

97 Higgins, (1963): 76.
98 Higgins, (1963): 8.

of the framers of the San Francisco draft and have repeatedly defined domestic jurisdiction on [purely] political grounds.

CHAPTER 4

ON THE MEANING OF INTERVENTION

4.1 The Meaning of Intervention

The purpose of this Chapter can be summarized as being twofold. Firstly, to consider what is meant by the term "intervene" within the context of Article 2(7) and secondly to consider what has been the United Nations practice in relation to the prohibition imposed by the Article against intervention in those matters, which pursuant to Chapter 3 are essentially within the domestic jurisdiction of a state.

As a follow-up to the previous Chapter, this Chapter explores what acts are forbidden by Article 2(7) as consisting intervention within the context of "matters essentially within the domestic jurisdiction of any state".

In order to achieve that purpose, we shall consider the topic in three broad parts. In the first part, we discuss various meanings and forms, which writers and publicists have attached to the term "intervention" in international law.

In the second part we seek to determine so far as is possible the meaning, which it was intended to ascribe to the term when Article 2(7) was drafted. In the final part we consider what meaning of the term has evolved out of the practice of international relations.

According to W.E Hall,[99] intervention takes place when a state interferes in the relations of two states without the consent of both or either of them, or when it

[99] W. E. Hall, *International Law* (7th ed.), (1917).

interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. Intervention is *prima facie* a hostile act because it constitutes an attack upon the independence of the state subjected to it.

That independence is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions to which it acts as an independent community.[100]

Intervention is said to occur when a state or group of states interferes in order to impose its will, in the internal or external affairs of another state, sovereign and independent, with which peaceful relations exist and without consent, for the purpose of maintaining or altering the condition of things.

P. H. Winfield[101] described intervention as "one of the vaguest branches of international law." He says:

> "We are told that intervention is a right that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all... Yet these methods of treating intervention are but natural consequences of the darkness which besets a subject, at no time clear and even now in a fluid condition.

Winfield traces the history of the word "intervention" in international law and asserts that it is of comparatively recent origins as no trace of any phrase corresponding to it is discoverable in the *De Jure Belli ac Pacis* of that leading publicist, Grotious. Acts of violence which in latter-day international law are treated as interventions were to Grotious just ordinary wars.

100 Hall, (1917): 10.
101 Winfield, (1922-3).

But on Vattel in his book "Droit des Gens", Winfield opines that-

> "there is every reason to believe that some passages scattered throughout the book are the nidus of the modern doctrine relative to intervention"

These passages he cites as including the following:

Book II page 55

> "One sovereign cannot make himself judge of the conduct of another."

P.56 –

How it is permitted to enter into a quarrel between a sovereign and his subjects.

> "When a people from good reasons takes up arms against an oppressor, justice and generosity require that brave men should be assisted in the defence of their liberties. Whenever therefore civil war is kindled in a state, foreign powers have the right of assisting that party which appears to them to have justice on its side ..."

P. 57

> "The right of not suffering foreign powers to interfere in the affairs of government."

P. 197

> "...But if the nation has formerly deposed its king or expelled its magistrates, to oppose these domestic regulations by disputing their justice or validity, would be to interfere in the government of the nation and to do it an injury."[102]

[102] Hall, (1917): 133.

Winfield concludes that Vattel made no attempt to typify any hard and fast doctrine by this "interference" but that it was for other jurists at a later date to weave the threads we find here and there throughout his book into the web of rules relative to intervention. Although there was little trace of the word "intervention" in the treatises of the jurists who flourished in the half century after Vattel, a chapter or a section in almost every book was devoted to the doctrine it now represents but which then passed current under other names.[103]

Vattel's successors forged and welded the materials which he supplied them into a more compact form but it was some time before "interference" was isolated as a substantive branch of international law, and longer still before it acquired "intervention" as a technical term to the exclusion of other cognate terms.

Although international law does not provide a complete answer to the question of the exact scope of intervention, there appears to be general agreement among publicists that intervention is dictatorial or arbitrary interference of a state, acting on its own individual judgement, in the affairs of another for the purpose of maintaining or altering the actual condition of things in the latter state.[104]

As one writer contends:

> "it is obvious that the right of a state to exist as a juridical person in the international community imposes the correlative duty of non-intervention on both the internal and external affairs of another state"[105]

Oppenheim says:

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103 Hall, (1917): 134.
104 Department of State XVIII Bulletin No. 449, "Sovereignty and Interdependence in the new World," (Feb. 8 1948): 155, 171.
105 Svarlien, *An Introduction to the Law of Nations* (1955): 123 – 124.

> "In connection with independence, writers usually discuss intervention, and a doctrine of non-intervention, has been built up which is regarded as the duty correlative to the right to independence. This duty is to refrain from the performance of any act which would violate the internal autonomy or the external independence of another state, such as the making of an arrest by one state within another or interference in the latter's foreign policy."[106]

According to Eagleton:

> "If, then, there should be taken away from states the right of self-help short of war-of which intervention is the most important method – they would be forced to fall back upon the far worse evil of war in order to maintain their legal rights. The objections to intervention are not so much due to its principle as to its abuse. Intervention is simply a weapon, which may be the sword in the hand of justice or a club in the hand of a thug."[107]

Whereas there may be uncertainty as to the exact nature and scope of the duty not to interfere, Preuss argues that the duty of non-interference has never been questioned in principle by states. Governments which have manifestly been guilty of initiating or encouraging revolutionary movements against foreign governments have consistently denied all connection with such movements. In every instance, they have objected to the allegations of the complainant government on the ground of inaccuracies or misrepresentations of fact, and have in no case attempted to maintain that the alleged connection if established, would not involve the state in a breach of international duty.[108]

106 Quoted in Wheaton, 331.
107 Eagleton, (1957): 21.
108 Preuss, "International Responsibility for Hostile Propaganda Against Foreign States," *Australian Journal of International Law* Vol. 28 (1934), (649).

To Verzijl,[109] the admissibility or inadmissibility of intervention in the affairs of a sovereign state by one or more other states has varied considerably in the course of time and still depends to a large extent upon its purpose and upon circumstances in which the action takes place. To him it is therefore incorrect to state in general terms that intervention is either admitted or condemned by international law. He asserts that intervention may be of different kinds, not only as to its methods and degree of intensity, but also and mainly as to its purpose – humanitarian, political, law enforcing, defensive, or other.

Winfield is of a similar view regarding the existence of a multiplicity of cultivars of intervention. He wrote:

> "It will be found that, in spite of a perplexing vagueness which enshrouds the word (intervention), it may be used in any one of three tolerably definite senses. The first and by far the most frequent of these is that of interference by one state between disputant sections of the community in another state, the matter of dispute being usually but not invariably some constitutional change.
>
> A second meaning which intervention may bear is that of a punitive measure adopted by one state against another in order to compel the latter to observe its treaty engagements or redress illegal wrongs which it has inflicted. Lastly, intervention may signify interference by one state in the relations – of other states, without the consent of the latter. This we have styled "external intervention."[110]

To Lauterpacht, "intervention" is a technical term of on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to the denial of the independence of the state. It involves a peremptory demand for positive conduct or abstention- a demand which if not complied with, involves a

109 Verzijl, op cit., 43, p. 236.

110 Winfield, (1922-3): 130-139

threat of, or recourse to compulsion though not necessarily physical compulsion, in some form.[111]

Hoffman[112] defines intervention as "acts which try to affect not the external activities, but the domestic affairs of a State."

According to D. R. Gilmour:

> "The subject of intervention has been, for many years one of those which raises great controversy. There has been continuing dispute in general international law as to the extent of the general duty which does exist of non-intervention by one state in the affairs of another. Moreover, it has never been settled, in general international law, just what the word intervention encompasses"[113]

Given the varying interpretations of the word "intervention and the difficulties of definition and crystallization to which we have alluded, it is now opportune to seek to understand the context in which the word was put into Article 2(7) of the Charter, and the meaning which it was intended to convey.

As Gilmour has said as the correct interpretation of the word "intervene" in United Nations practice has, since the very inception of the organization, been such a bone of contention, it is reasonable to ask whether the founders of the United Nations either by oversight or possibly intentionally inserted into the Charter a term the meaning of which they were not sure or which they feared to discuss at length lest it hinder the establishment of the organization itself. The answer to this question can

111 Hersch Lauterpacht, *International Law and Human Rights* (Stevens and Sons Ltd.): 167-168.
112 S. Hoffman, *The Problem of Intervention, in H. Bull (ed), Intervention in World Politics*, (Oxford: Clarendon Press 1984): 10.
113 Gilmour, (1967).

only be found, if at all, in the records of the United Nations Conference on International Organization held in San Francisco in 1945.[114]

Goronwy J. Jones[115] in "The United Nations and the Domestic Jurisdiction of States" has argued that what was confusing about Article 2(7) as it was settled upon by the drafters was the use of the term to "intervene" in the first part of the paragraph whereas during the early stages of developing the draft the words to "interfere" had been used yet, the two terms did not have the same technical connotation.

To him, the transfer of the domestic jurisdiction reservation to Chapter II on Principles meant that the principle of non-intervention was to apply to all the operations of the organs of the Organization except those of the Security Council when dealing with threats to the peace or breaches of the peace arising out of matters essentially within the domestic jurisdiction of states and hence to the non-mandatory recommendations of the Security Council and the General Assembly in the pacific settlement of disputes, as well as to the resolutions and recommendations of the General Assembly and the Economic and Social Council on States' policies on economic and social matters, including human rights.[116]
Jones concludes by saying-

> "It is logical to infer, therefore that by non-intervention under the general rule of Article 2 (7) its drafters meant "no interference in any form..."[117]

To ascertain what the drafters of the Charter intended by the text of Article 2 (7) one naturally has to rely on the *travaux preparatories*. But naturally, there are varying

114 Gilmour. (1967): 332.
115 Jones. (1979): 23.
116 Jones. (1979): 23.
117 Jones. (1979): 23.

interpretations even of these. Rajan[118] in the book United Nations and Domestic Jurisdiciton" has commented:

> "At the San Francisco Conference, it is important to note, there was not a single amendment suggested or comment or opinion expressed on the meaning of the term "to intervene." Therefore, the intention of the framers of the Charter in regard to the meaning of the term can only be inferred from the preparatory work of the Conference. However two apparently contradictory intentions could be inferred from preparatory work and we shall therefore have to fall back on the Purposes of the Charter in order to harmonize these apparently contradictory intentions and to render the Purposes meaningful and effective."

Gilmour disagrees and submits that Rajan's conclusion is erroneous. His own study of the *travaux preparatoires* so far as the meaning which the founders of the United Nations intended to attach to the word "intervene" is concerned leads him to hold that the San Francisco records are neither ambiguous nor obscure.

On the contrary, he argues that the general trend of the Conference on this question was quite clear. The delegations most intimately connected with the drafting of Article 2(7) indicated that by the term "intervene" they understood any "action" by any organ of the United Nations concerning a matter which was within domestic jurisdiction of particular states; i.e. any discussion of or recommendation, inquiry or study concerning the domestic affairs of one state in particular or a particular group of states would amount to intervention. Those most intimately connected with the drafting of the Charter provisions dealing with the related subjects of the Organization's jurisdiction and its duty not to intervene in matters beyond that scope indicated clearly that by the term "intervene" they mean "interference pure and

118 Rajan, (1961).

simple." He is therefore of the view that submitted beyond doubt, they never intended to limit this word to "dictatorial interference."[119]

Rosalynn Higgins, in the book "The Development of International Law through The Political Organs of the United Nations," takes a different angle at approaching the question whether the drafters of the Charter aimed at a broad or narrow interpretation of the word "intervene".

She contends that Articles 10, 11, 13 and 14 of the Charter are especially relevant in the context of this controversy as they give the General Assembly powers of discussion and recommendation, and to interpret "intervention" in a broad sense would severely curtail the role of the General Assembly in these areas.

She argues that whether or not it was intended that the task laid out for the Assembly in these areas should be read in the light of a strong domestic jurisdiction reservation is a point complex enough to require recourse to the travaux preparatories.

However, she argues also that, those are not unambiguous themselves and both schools of thought have found in them evidence to support their own views. The Verbatim Minutes of Committee 1/1 show that various delegates used the term "intervene" in different ways.[120]

The countries most intimately related to the text, which eventually became Article 2 (7), were the United States, the Soviet Union, China and Great Britain. These were the four great powers that sponsored the amendments, which culminated in Article 2 (7).

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119 Gilmour. (1967).

Mr. John Foster Dulles of the United States gave an explanation of the basic concept of non-intervention. He said:

> "I want first to make it clear, if I may, that we are dealing now with a principle, not with some technical rule of law dealing with international disputes ... The language of this principle is in some respects similar to the language which was found in the Covenant of the League of Nations, Article 15, and in the original Dumbarton Oaks Proposals. But in both the League of Nations Covenant and in the original Dumbarton Oaks proposals, the language was that of a rather technical subject matter, namely the settlement of disputes by the Council. The Present Four-Power amendment puts the matter in a totally different aspect, and presents a new and basic principle governing the entire Organization: that the Organization, in none of its branches, in none of its organs, shall intervene in what is essentially the domestic life of the member States"[121]

Jones has argued that Mr. Dulles' statement implied that the term "to intervene" was not to be interpreted in its traditional legal sense as defined by Lauterpacht but rather as meaning "interference in any form." He contends that in the light of Mr. Dulles speech, it may be inferred that although the sponsoring powers looked forward to inter-governmental cooperation in solving problems of an economic and social nature through the work of the Assembly and the Economic and Social Council, they were opposed to any form of interference by those organs in the economic and social policies of states.

To his mind, it is reasonable to conclude, therefore, that whilst they intended that the Assembly and Economic and Social Council should function within their terms of reference by discussing economic and social matters, and addressing recommendations on such issues generally to member-states for their guidance, in

120 Higgins. (1963): 31.

order to facilitate international economic and social cooperation, they did not intend that those organs should hold discussions, institute investigations, and pass recommendations on the economic and social policies of a particular state, which would embarrass it through some form of censure or urge it to take action to effect a pacific settlement of an international dispute arising out of a matter which it regarded as a domestic question.[122]

The only exception to the general rule of non-intervention or non-interference was the Security Council's competence to authorize enforcement measures against a State; if the Council decided that a situation arising out of an economic or social matter within that state's jurisdiction, or any other matter of domestic jurisdiction, constituted a threat to a breach of international peace and security.[123]

It seems a gargantuan task indeed to determine what the intention of the drafters were when coming up with Article 2(7) seeing the two compelling arguments on either side. Could it be that even the drafters were speaking at cross-purposes? Could it be that the drafters intended a meaning other than that which they in fact put into the Charter? We agree with Higgins that:

> "It seems that this dichotomy between the Conference documents and the Charter itself can only be resolved by reference to the practice of the United Nations. This is not to say that an organization can possibly add anything to its powers by exceeding its competency, no matter how often such actions may be repeated. However, the practice of the organization provides important evidence of the development of the law at a given time and may help to clarify the intention of the signatories of the Treaty."[124]

121 UNCIO Documents, Committee, 1/1, Verbatim Minutes of Seventeenth Meeting, June 14, 1945, Nos. 15 -16 as quoted by Jones, (1979).
122 Jones, (1979): 27.
123 Jones, (1979): 27.
124 Higgins, (1963): 41, 72.

Has the practice of the United Nations vindicated what appears to be the preponderant view that there was an intention paramount in the minds of the drafters [of Article 2(7)] to prevent the General Assembly, or, for that matter, any other organ of the United Nations, from exercising any function in connection with matters which were regarded as within the domestic jurisdiction of a particular state.

Several questions have arisen in the practice of the United Nations, which have pointed the way about the contemporary understanding of the intervention prohibited by Article 2(7) whatever may have been the intention of the drafters. These questions have included:

(a) whether placing an item on the agenda of a UN organ constitutes intervention;
(b) whether discussion of a matter by an organ of the United Nations constitutes intervention; and
(c) whether a recommendation or a resolution by an organ of the UN on a matter within the domestic jurisdiction of a state amounts to intervention.

4.2 Does Placing an Item on the Agenda of a UN Organ Constitute Intervention?

As we have seen earlier, the General Assembly has never given support to the proposition that placing a matter on the agenda can constitute an intervention. United Nations practice is replete with numerous instances when an item has been placed on the agenda of an organ of the UN despite protestations that the matter fell within the ambit of the prohibition in Article 2(7). A few such instances will illustrate the point.

As we saw earlier, as early as 1946, when the UN was hardly a year old, the Government of India sought to have the United Nations condemn the discriminatory practices of the Union of South Africa against the Indian population of the Union. The South African delegation to the first General Assembly though protesting that the treatment of the Union's Asiatic population most of whom were nationals of South Africa was a domestic matter in which the United Nations under Article 2(7) could not legally intervene, agreed to full discussion of the matter.[125]

India again put the matter of the treatment of Indians in the Union of South Africa on the agenda of the Third Session of the UN General Assembly held in 1948. This question featured on the agenda of the General Assembly for nearly all of the succeeding sessions. At the Twelfth Session of the Assembly in 1957, the United States did not believe that discussion of such an item infringed on the limits set by Article 2(7) of Charter.[126]

Although subsequently several delegations were to criticize a proposed resolution on matters governed by the Charter provisions regarding Non-self Governing Territories as being essentially within the domestic jurisdiction of the Mandatory States, no objection had been raised when on November 1, 1946, the representative of the Philippine Government had requested the General Assembly to include in the agenda of the second part of its first session a "proposal to hold a conference to implement the provisions of Chapter XI of the Charter".[127] Indeed, the General Assembly went ahead and included that proposal in the agenda without any objection being raised.

125 Repertory of Practice of United Nations Organs Articles 1-22 of the Charter (1955): 67 –75.
126 Repertory of Practice of United Nations Organs Articles 1-22 of the Charter (1955): 67 –75.
127 GA (1/2), 6th com, annex 18, 284 – 286.

Beginning in November 1961 and throughout the 1960's the General Assembly had to discuss issues relating to the international respect for the self-determination of peoples. These issues invariably dealt with the treatment of colonized peoples by the colonial powers and with aspirations of those peoples to attain independence and self-government. Despite attempts by the Colonial powers to hide behind the prohibitions of Article 2(7), seldom did the General Assembly fail to include an item on its agenda on the ground that Article 2(7) would thereby be contravened.

Nor is the position limited to the General Assembly. By a letter dated April 9 1946 the Polish representative referring to Articles 34 and 35 of the Charter of the United Nations brought to the attention of the Security Council the view that the activities of the Franco regime in Spain had already caused international friction and endangered international peace and security.[128] On April 15, 1946 the Security Council included the item on its agenda without discussion.[129]

Similarly, despite the objections raised by certain members of the Security Council that the situation fell essentially within the domestic jurisdiction of Greece, the Security Council, on September 3, 1946, included in its agenda the Ukranian Communication dated August, 24 1946 bringing to the Security Council's attention "the situation in the Balkans which has resulted from the policy of the Greek Government."

This is not to say that there have not been cases where an organ of the United Nations has voted not to include an item on its agenda on the grounds of Article 2(7). In the Question of Morocco, the representatives of fifteen Member states acting under Article 35(1) of the Charter, brought to the attention of the Security

128 SC. Off. Rec, 1st yr; 1st Series, Supp. No. 2, 55, annex 3b (S/34).
129 SC. Off. Rec, 1st yr. 1st Series, No. 2 32nd mtg., 122.

Council the situation created by the unlawful intervention of France in Morocco and the overthrow of its legitimate sovereign.[130]

During the discussion on the adoption of the agenda, the representative of France opposed the inclusion of the item in the agenda on the grounds of Article 2(7). He contended that, although Morocco had remained legally a sovereign state, it had transferred to France the exercise of its external sovereignty by the Treaty of Fez. Accordingly, the matters governed by that treaty – and in particular, the situation brought to the Council's attention fell essentially within France's domestic jurisdiction. Moreover, the situation fell within Morocco's domestic jurisdiction as well. Its discussion by the Council would therefore constitute a two-fold violation of Article 2(7).[131]

This last case would seem to be the exception rather than the rule. It seems to be settled UN practice that Article 2(7) cannot operate to bar an organ of the UN from including an item on its agenda and accordingly that act alone is not deemed to constitute intervention.

4.3 Does Discussion of a Matter by a UN Organ Constitute Intervention?

The second question posed was whether discussion of a matter by a UN organ constitutes intervention:

According to Article 10 of the Charter:

130S.C. 8th yr. Suppl. for July, Aug. and Sept. p. 51, S/3085) dated 1953.
131 S C. 8th yr. 619 mtg paras 22 – 28.

> "The General Assembly may discuss any questions or any matters within the scope of the present charter or relating to the powers and functions of any organs provided for in present Charter...."

Wright in a paper titled "Is Discussion Intervention?"[132] has cited the example of the Algerian Question in answering that question. In that matter, fourteen African and Asian states proposed to place the problem of Algeria on the agenda of the UN Tenth General Assembly. Their proposal was rejected by the General Committee on the ground that the problem was within the domestic jurisdiction of France and that discussion in the General Assembly would be likely to increase the threat to peace. The proposal was renewed on the floor of the General Assembly and supporting the earlier decision the head of the French delegation Mr. Antoine Pinay had the following to say:

> "If it were decided to discuss here the French problem of Algeria, nothing would ever restrict, in the future, the right, which we would all have, to interfere in the internal affairs of any one of us, since this Assembly [the General Assembly] would henceforth have recognized that very right. The territorial unity of any state, the treaties whether old or recent, relating to boundaries, could at any moment be challenged. For many it would be the end of security and for the weakest the end of independence."[133]

The General Assembly proceeded to vote and decided to place the matter on the agenda.

According to Wright,[134] France could rely on Article 2(7) only if discussion of the Algerian Question was "essentially within the domestic jurisdiction" of France.

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132 Wright, (1956): 102.

133 *New York Times*, October 1955, as quoted by Quincy R. Wright, (1956).

134 Wright, (1956): 104.

Wright poses as a matter of principle the question: "Is discussion intervention?" He answers the question by asserting that, there is ample ground to answer this question in the negative. He asserts that the General Assembly has never given any support to the proposition that placing a matter on the agenda and discussing it whatever the subject matter could constitute "intervention" in the domestic affairs of a state.[135]

He argues that Article 14, suggested at San Francisco by Senator Vandenberg, was designed to ensure that the General Assembly should be the "town meeting of the world" in which any circumstance "likely to impair the general welfare or friendly relations among nations' including demands for the revision of treaties could be discussed.[136]

Arguably, it is difficult to fathom that the Charter intended to confer a more extensive veto upon consideration and discussion of questions in the General Assembly than is enjoyed by the great powers in the Security Council. It would appear clear that full rights of discussion were intended to exist in both organs. Only after discussion has disclosed the facts of the situation could a great power veto investigation in the Security Council and only after a definite resolution is up for consideration in either the Security Council or the General Assembly could any state properly plead that the proposal would constitute intervention in its domestic affairs.[137]

When an organ of the UN decides to put an item on the agenda, its discussion follows nearly as a matter of course. In the cases we have cited above, the General Assembly and the Security Council respectively having put the matters in issue on the agenda invariably discussed them.

135 Wright, (1956): 104.
136 Wright, (1956): 104.
137 Wright, (1956): 104.

At the Twelfth Session of the General Assembly, when the question of the treatment of Indians in the Union of South Africa was considered, the United States Representative said that his Government did not believe that discussion of an item infringed on the limits set by Article 2(7). Indeed throughout the long history of Apartheid South Africa, that country contended unsuccessfully sometimes with the support of a number of Western countries that the General Assembly was prohibited by the provisions of Article 2(7) from even discussing their racist policies.

Similarly, in the colonial conflicts commencing 1946 all through the 1960's, in the Questions of among others Morocco, Algeria and Tunisia, the General Assembly of the United Nations upheld its competence to discuss the matters raised. Jones however argues that:

> "The arguments in favour of the [General] Assembly's competence ...ran counter to the intentions of those who drafted the Charter and the Assembly's own approach to the formulation of an international bill of human rights."[134]

He contends that:

> "The colonial powers which participated in the formulation of the Charter of the United Nation at San Francisco in 1945 understood "non-intervention" to mean "non-interference" in any form: and they assumed that the principle of equal rights and self determination of people" referred to in Article 1 (2) of the Charter did not have the force of a legal right for colonial peoples and an international legal obligation for colonial powers. Consequently, they believed that questions pertaining to the administration of their colonies involving the timing and manner in which political and constitutional developments were to be effected

[134] Jones, (1979): 88.

> remained essentially within their domestic jurisdiction and thus outside the international jurisdiction of the United Nations."[139]

If these representations are upheld, then the conduct of the General Assembly and the Security Council in the colonial questions represented a departure and a disregard of the intentions of those who drafted the Charter.

4.4 Does a Recommendation by a UN Organ on a Matter within the Domestic Jurisdiction of a State Constitute Intervention?

We should now consider whether the UN practice supports the position that a recommendation or a resolution by a United Nations organ on a matter within the domestic jurisdiction of a State amounts to an intervention of the kind prohibited by Article 2(7).

In the cases we have considered above, the United Nations appears to have answered this question also in the negative in so far as the General Assembly and the Security Council proceeded to arrive at resolutions and recommendations on the matters.

In the Observance of Human Rights in the Union of Soviet Socialist Republics (prevention of Soviet wives of foreign nationals from leaving the USSR) case, the General Assembly was asked to include in its agenda an item on "Violation by the USSR of Fundamental Human Rights, Traditional Diplomatic Practices and other Principles of the Charter. The representative of Chile alleged that the USSR had taken legislative and administrative measures to prevent Soviet "wives of foreign nationals from leaving the USSR either in company with their husbands or in order

139 Jones, (1979): 114.

to rejoin them and that those measures violated Charter provisions on human rights and could impair the friendly relations among nations.

The USSR sought to rely on Article 2(7) arguing that the women referred to had retained Soviet citizenship, were therefore under the nationality laws of the USSR and its regulations on exit visas for its own nationals, and those were therefore matters within the USSR's domestic jurisdiction.[140]

Despite the objections, the General Assembly at its 197th meeting on 25th April 1949. adopted as we have earlier seen, Resolution 285 in which the General Assembly-

> "[Declared] that the measures...are not in conformity with the Charter... and are likely to impair friendly relations among nations;
>
> [Recommended] the Government of the Union of Soviet Socialist Republics to withdraw the measures of such a nature, which have been adopted."[141]

In the Question of the Race Conflict in the Union of South Africa. the South African Representative, Ambassador Jooste argued that the Charter gave the Assembly no power to deal in any way with the subject owing to Article 2(7) and that his country would regard any resolution emanating from a discussion of the item as *ultra vires* and therefore null and void.

Despite these objections, the Assembly passed a resolution establishing a Commission composed of three members to study the racial situation in the Union of South Africa.[142]

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140 GA (III/1) Gen.Com; 43rd; 10 and 11; Plen. 142nd mtg; 97 and 98; G A(III/2) Plen; 196th mtg; 153.
141 Repertory of Practice of United Nations Organs, Articles 1 –22 of the Charter (1955): 81-83.
142 Repertory of Practice of United Nations Organs, Articles 1 –22 of the Charter (1955): 101 – 104.

That the United Nations organs have not considered themselves prohibited from adopting resolutions or recommendations on matters which states have claimed to be within their domestic jurisdiction does not tell us the full story about whether such recommendations are binding particularly on the members erecting such claims.

Antonio Cassese in "International Law in a Divided World"[143] says:

> "Resolutions are... still governed by the UN Charter provisions which grant the Assembly and other bodies (except of course, for Security Council) hortatory powers only....
> Most General Assembly resolutions produce very limited effects because in addition to the intrinsic limitations deriving from the Charter, their very contents and the sort of majority behind them frequently result in their carrying little weight".

He concludes:

> "The view that, except for a few well-defined cases resolutions do not possess a legally binding value per se is by far the most widespread in the Western legal literature. The same view is also upheld, to a very large extent by the jurists of Eastern European countries. Some international lawyers from the Third World also tend to regard UN resolutions as devoid per se of binding force, although they strongly emphasize the importance that resolutions can acquire in many respects with regard to customary process or even from the viewpoint of treaty making."

It is probably the case that the drafters of Article 2(7) intended to prohibit any form of interference by the General Assembly and other organs in the domestic affairs of a state. If all they meant to prohibit was only dictatorial interference or interference backed by compulsion and force, then Article 2(7) would not have been particularly

[143] Cassesse, (1986).

meaningful as the Security Council, the only organ exempted from the prohibition in certain circumstances is, any way, the only organ which is authorized to require certain mandatory actions from states.

As Brownlie states in the book "Principles of Public International Law",[144] the word "intervene" has been approached empirically. Discussions, recommendations in general terms and even resolutions addressed to particular states have not been inhibited by the form of paragraph 7 [of Article 2]. At the same time, the term intervene is not to be conceived of only as a dictatorial intervention in this context. Member States have proceeded empirically with an eye to general opinion and a clear knowledge that precedents created in one connection may have a boomerang effect.

The practice of the United Nations organs needs to be put into perspective. The General Assembly in particular is a political rather than a judicial organ. For this reason its decisions on objections based on Article 2(7) have tended to be guided by their political ramifications rather than the legal restrictions.

4.5 Conclusion

To conclude this Chapter, we are constrained to observe that the practice of the General Assembly, the apex organ of the United Nations seems to have modified the prohibition of intervention in Article 2(7), to exclude any situation where the Assembly feels that the actions complained of are contrary to the purposes and principles of the Charter and that the issue is endangering international peace and

[144] Brownlie, (1990).

security. This is so notwithstanding the express provisions of Article 2(7) and despite the intentions of the drafters of the Article!

CHAPTER 5

ON THE COMPETENCE TO INTERPRET ARTICLE 2(7)

Even if we are absolutely certain what matters are essentially within the domestic jurisdiction of a state and what constitutes intervention, we are still faced with the difficulty of determining which organ of the United Nations is mandated to make decisions about whether or not Article 2(7) has been contravened.

To this issue of the competence to make a determination that a matter is essentially within the domestic jurisdiction of a state, Article 2(7) is alarmingly deficient. As has already been observed, Article 15(8) of the Covenant was express in stipulating that it was the Council of the League of Nations, which had the authority of deciding whether in any particular case the reservation of domestic jurisdiction applied. By its ominous silence on this score, Article 2(7) has created a chronic controversy pitting two main diametrically opposed interpretations.

On the one hand are those who argue that by failing to prescribe an organ as being responsible for determining the applicability of the domestic jurisdiction reservation, Article 2(7) of the Charter left it to individual states to make that determination in any case in which their interests are involved. Watson[145] for instance in a most spirited exposition of this view contends that prior to the institution of international organizations, the concept of sovereignty clearly included the power of auto interpretation of international obligations and any departure from this was itself due to an exercise of sovereignty on the part of the state in question. In other words, the requirement of consent was so

145 Watson, (1971): 61.

complete that not only could a state not be bound by a rule of international law to which it had not consented but it could not even be bound by an external interpretation of its freely given obligations, unless it had surrendered the power to interpret the obligation in question to some other organ.

A significant advance was accordingly made in the Covenant of the League of Nations in that, Article 15(8) required the determination of whether a matter was of domestic jurisdiction to be made by the League Council and the Council in making that decision was required to apply the relatively objective standard of international law.

After the collapse of the League, is it plausible to argue that this power of determining whether a matter is of domestic jurisdiction reverted to the individual states?

Some states[146] have subscribed to this point of view and have gone ahead to write into a number of their treaties an acceptance of the ICJ's jurisdiction under the optional clause the rider that "matters essentially within their domestic jurisdiction as determined by themselves" are to be excluded from such jurisdiction of the Court. Waldock[147] has lamented that this is tantamount to a reversion to the position before the Covenant when states asserted a general right to determine the scope of their reservations.

On the other hand and no less vehement is the school of thought which considers auto interpretation to be absurd and unacceptable and which argues that the interpretation of Article 2(7) must vest in the various organs of the United Nations.

146 They include United States of America, Mexico, Pakistan and France.
147 Waldock, (1974): 127.

Lauterpacht[148] for example argued that the lack of an organ of interpretation is not peculiar to this Article, that it is a common condition of the entire Charter, and that the authority to decide upon disputed questions of interpretation of the Charter belongs in principle to the organ charged with its application.

Reinforcement for this approach is to be found in the record at San Francisco where it was generally assumed that each organ of the United Nations would interpret for itself the Charter as it related to its functions. Indeed the Report of the Rapporteur of Committee IV/2 included the following passage:

> "In the course of the operations from day to day of various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body, which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.[149]

Alf Ross[150] is of a similar view. He argues that it is necessary to fall back on the generally recognized rule that an organ must itself decide the extent of its competence.

Under Article 15(8) of the League Covenant, the Council was the organ determining the justification of reliance by a party on this exception clause.

148 Lauterpacht, 181.
149 13 UNCIO Documents, 709.
150 A. Ross, "The Proviso Concerning "Domestic Jurisdiction" in Article 2(7) of the Charter of the United Nations," *2 OSTERR ZEIT. OFFEN. RECHT* (1950): 562, 570

Under Article 2(7) of the Charter, parties and the United Nations organs alike are entitled to their own interpretation of this principle of the United Nations.

In the Interpretation of Peace Treaties Case, the International Court of Justice explained why, in the case before it, objections based on Article 2(7) of the United Nations Charter had to be rejected. The questions asked by the General Assembly did not relate to the substance of the protection of human rights in the Peace Treaties of 1947. They merely involved clarification of the procedure for the settlement of disputes under these treaties and such interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a state, but rather it is a question of international law which by its very nature, lies within the competence of the Court.[151]

Allowing for the element of relativity in Article 2(7) of the United Nations Charter (as in Article 15(8) of the League Covenant), Article 2(7) is the last bulwark of dissident minorities in the political organs, which decide by majorities and are not too particular about overstepping the jurisdiction allocated to them under the United Nations Charter. Ultimately, the character of Article 2(7) as *jus cogens* of the organization allows every member to oppose his own interpretation of a situation to that of any organ of the United Nations. It also puts a limit to any estoppel which is supposed to arise from ineffective opposition and indefinite continuation of membership in the face of the self-arrogation of a dubious jurisdiction by United Nations organs.[152]

151 ICJ Reports (1950): 70-71.
152 ICJ Reports (1950): 330.

Thus, it is not surprising that, in the political organs of the United Nations, persistent attempts should have been made to minimize the significance of Article 2(7).[153]

In Judge Ammoun's Separate Opinion in the Barcelona Traction Case, these efforts found a sympathetic response. He pointed out the quarters to whom the United Nations was indebted for what he considered to be a reasonable interpretation of Article 2(7) in the political organs of the United Nations. In his view, this change in emphasis was "to a large extent due to the contribution of the representatives at the United Nations of the countries of the Third World."[154]

Judge Ammoun further described the process of the "ever less strict interpretation" of Article 2(7) of the United Nations Charter as follows:

> "It is in this field in particular that the organs of the United Nations, strengthened by the presence of the new countries, yearning for a new law, outstripping judicial bodies apparently still attached to tradition, have blazed a trail towards renovation. The General Assembly and the Security Council, when dealing with questions of concern to the international community or touching upon the great principles of the charter, have after long debates, session after session, finally overridden the objection based on Article 2(7), thanks to a reasonable and extensive interpretation – express or tacit – of its words."[155]

In his Dissenting Opinion from the Court's Order for Interim Measures (1973) in the Nuclear Test Cases (1973 – Australia and New Zealand against France), Judge Ignacio-Pinto attacked the Court's Order as incompatible with Article

153 ICJ Reports (1950): 331.
154 ICJ Reports (1950): 313.
155 ICJ Reports (1950): 314.

2(7) of the United Nations Charter. The nuclear tests carried out by France were exercises of sovereignty within French territorial limits. Mere apprehensions on the part of Australia and New Zealand regarding harmful effects of fall-out beyond this territorial limits did not affect the character of these tests as matters essentially within the domestic jurisdiction of France.[156]

By subsequently declaring the case to have lost its object (1974), the Court precluded itself from dealing with this or any other substantive issue raised in the proceedings.[157]

It is in cases such as those involving the Principles of the United Nations that a judicial organ itself is on trial. Thus, it was just as well that, in the judgment in the North Cameroons case, the Court should have reminded all concerned that, in the end, it is the Court itself which must be the guardian of its judicial integrity.[158].

As the International Court of Justice is the judicial organ of the United Nations, might it not be the case that the members contemplated that this should be the organ with competence to determine whether a matter is or is not within the domestic jurisdiction of a State? This does not appear to be the case from a reading of the Statute of the International Court of Justice.

Article 36 of the Statute of the ICJ on the jurisdiction of the Court provides:

> 1. The jurisdiction of the Court comprises all cases, which the parties refer to it, and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.
> 2. The State parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in

156 ICJ Reports (1973): 130, 133 and 164 as cited in ICJ Reports (1950): 108.
157 ICJ Reports (1974): 253.
158 ICJ Reports (1963): 29.

relation to any other State accepting the same obligation the jurisdiction of the Court in all legal disputes concerning

a) the interpretation of a treaty.
b) any question of international law
c) the existence of any fact which if established would constitute a breach of an international obligation.

3. ...
4. ...
5. ...
6. In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court.

This then is the ICJ's jurisdiction in contentious matters. Here, the relevance of Article 2(7) is minimal since:

(a) If parties refer a matter to the ICJ, then it is not likely that such parties will also in the same vein contest the jurisdiction of the very Court to which they are themselves referring a matter.

(b) If jurisdiction in a matter is specially provided for in the Charter or in treaties and conventions in force, then again, there would be no basis for erecting an argument based on Article 2 (7).

(c) Article 36 (6) makes it clear that in respect of the Court's contentious jurisdiction, the Court has the power to decide whether or not it has jurisdiction in the matter.

In the Anglo – Iranian Oil Co. Case[159] the plea of domestic jurisdiction was raised by Iran. The Court said among, other things:

"Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29,

159 ICJ Reports (1951): 89.

> 1933 and by a denial of justice which, according to the Government of the United Kingdom would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, … it cannot be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction."

This case supports the contention that Article 2(7) cannot be a bar to the ICJ entertaining a matter at all – on the claims of one of the parties that it is within that party's domestic jurisdiction. For surely, the Court must first listen to both sides of the story so as to reach that determination. But the Court, being one of the organs of the United Nations would be bound by Article 2(7) if it did find that, that Article in fact applied.

Apart from jurisdiction in contentious cases, the ICJ also has jurisdiction to give advisory opinions. Article 65 of the Statute of ICJ provides:

> 1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
> 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Because the Court carefully limited its pronouncement in the Interpretation of Peace Treaties Case to the particular point at issue, the application of the disputed clauses of the Peace Treaties, not much can be construed from this particular case on the Court's general views on Article 2(7). In particular, the following questions do not find clear answers in this case: Can the Court give an Advisory Opinion on a matter that is essentially within the domestic

jurisdiction of a State? Can it exercise its contentious jurisdiction in such a matter?

But more germane to our discussion: Is it the province of the Court to determine that a matter is or is not within the domestic jurisdiction. For this last question, we probably have an answer. That if the Court is exercising jurisdiction in a matter it certainly can find that, that matter falls under the ambit of Article 2(7).

J.S. Bains[160] in "Domestic Jurisdiction and the World Court" states:

> "Controversy has arisen over the point whether the Court is entitled to interpret the UN Charter. As the advisory opinion of the Court dealing specifically with Article 2(7) would amount to interpreting the Charter interested States have objected to the former's competence to exercise such jurisdiction. It has been argued that the Court's advisory opinion cannot extend to the interpretation of the Charter because it would amount to placing the Court in a more favourable position vis-à-vis other organs of the United Nations."

Prof. Waldock has argued that while the erection of the reserved domain into a constitutional limit upon international jurisdiction may be relevant in the case of international political organs not bound to decide in accordance with the legal rights of the parties, it creates an entirely artificial position in relation to international legal tribunals. If the matter is within the reserved domain, the tribunal is incompetent to investigate the merits at all. Yet it cannot determine whether or not the matter is within the reserved domain without an investigation of the merits.[161]

160 Bains, 487.
161 Waldock, (1974): 140.

5.1 A Case for Auto-interpretation

What about the argument that Article 2(7) did not expressly vest in any organ the competence to interpret it, precisely because there was no intention to yield those powers to an organ of the UN and that it is up to every State to determine for itself what matters are within its domestic jurisdiction?

According to Watson who is probably foremost in advocating for this position, the complete absence of any reference to an organ authorized to decide upon the applicability of Article 2(7) or to interpret it authoritatively was an intentional lacuna.

He argues that at San Francisco, despite the fact that a majority of governments which commented on Chapter VIII (a / 7) favoured a more precise formulation of the provision, especially with a view to assuring a decision by the International Court of Justice, the article as formulated deliberately contained neither a reference to any adjudicatory body nor mention of the standard of "international law."

He points to the fact that a proposal by the Greek Government that it should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that, under international law, fall within the domestic jurisdiction of the State concerned failed to secure the required two thirds majority.

Watson therefore argues that:

> "Whether one sees this as being the product of a conscious desire to protect State sovereignty or the product of a trend away from international adjudication

> per se, the result is clear. A serious attempt was made to endow the international court of Justice with the requisite power and that attempt failed."[162]

He asserts that even a case for authoritative interpretation by the General Assembly was also made but similarly failed to be adopted.

Watson's views have various shortcomings. Firstly, these views can find no support in the practice of the United Nations. No single organ of the United Nations has ever held the view that any state was entitled to interpret for itself when Article 2(7) was applicable.

But again, in fairness to Watson, his argument is based on the wording of the Charter and what he considers to be the intention of the drafters rather than on any practice that has subsequently evolved. If anything, Watson's argument is that the evolved practice has witnessed a usurpation of the competence to interpret Article 2(7) by the UN organs.

The case for auto-interpretation of Article 2 (7) offends a very basic principle of natural justice - *non est partum in re causa sua*, namely that, no one is to be a judge in his own cause. It undermines the good order of international intercourse and is not consistent with the purposes for which the United Nations was established, among them:

> "... to bring about in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[163]

162 Watson, (1971): 25.
163 Article 1 (1) of the United Nations Charter.

It is also doubtful whether auto-interpretation would be consistent with principle of the "sovereign equality of members"[164] since a member would effectively be making herself the Judge of a matter in dispute between her and another member.

But this is countered by the argument that Article 2(7) was inserted in the Charter as a basic principle involving the allocation of legal competence between the potentially supranational organization on the one hand and sovereign states on the other, precisely to maintain the pre-eminence of the member states. Since it is the legal expression of the continuing political fact of sovereignty, its validity cannot be defeated by neat deductions from principles and rules of international law.

The force of Article 2 (7), it is argued, is more of a political than a legal matter, and it is this that necessitates a positivistic treatment and a continuing need to base any modification of the meaning of the Article on the clear consent of states.

The Court has dealt with the question of auto-interpretation, albeit not directly. In the Norwegian Loans Case[165], one judge made a scathing attack on a French reservation which provided for "differences relating to matters which are essentially within the national jurisdiction as determined by the Government of the French Republic..." pointing out that no legal obligations had been created. He said:

164 Article 2 (1) of the United Nations Charter.

165 "Case of Certain Norwegian Loans," ICJ Reports (1957).

> "An instrument in which a party is entitled to determine the existence of its obligations is not a valid and enforceable legal instrument ... it is not a legal instrument. It is a declaration of political principle and purpose."[166]

Whatever the merits of the arguments for auto-interpretation, the fact is simply that they are hopelessly out of touch with the reality on the ground. The practice of the United Nations has shown that the organs of the United Nations have not had any misgivings on the issue and have assumed competence to interpret the applicability or inapplicability of Article 2(7), as a matter of course.

It is idle to argue that the actions of the United Nations are illegal since it is well known that practice is one of the sources of international law. The meaning of a provision in the Charter may legitimately be found in the practice of the UN organs and this practice becomes valid international law on the basis of customary acceptance regardless of the specific provisions of the Charter, the *travaux preparatoires*, or the real or presumed intent of the original signatories.

As Higgins[167] says in her book: "the Development of International Law through the Political Organs of the United Nations," the United Nations is a very appropriate body to look to for indicators of developments in international law, for international custom is to be deduced from the practice of the states.

Let us look briefly at the practice of the UN in disputes relating to competence to interpret Article 2(7).

166 ICJ Reports (1957): 48.
167 Higgins, (1963): 31.

5.2 United Nations Practice on Interpretation of Article 2(7)

One writer[168] commenting on the first twenty-five cases in which an objection was raised on the basis of Article 2(7) affirmed that in none of those cases, had the General Assembly decided that the subject was beyond its competence by virtue of Article 2 (7).

In the Question of the Treatment of People of Indian Origin in the Union of South Africa discussed earlier in Chapter 3, the Assembly's handling of the case from 1946 to 1950 left no doubt at all that the General Assembly was positive that it was competent without seeking the advice of the ICJ, to adopt various procedures relating to this case concerning allegations of violations of human rights, despite the claims of the Union of South Africa (the accused state) that such procedures contravened the principle of non-intervention in matters essentially within the domestic jurisdiction of a State, under Article 2 (7).

The Assembly similarly assumed competence in the case of the Violation by the Soviet Socialist Republics of Fundamental Human Rights, Traditional Diplomatic Practices and Other Principles of the Charter.

Another organ of the United Nations, the Economic and Social Council had in 1947[169] and 1959[170] held that its subsidiary organ, the Commission on Human Rights had no authority to take action in regard to complaints concerning human rights. These decisions so it held were in line with the principle of non-

168 F. Vallat, *The Competence of the United Nations General Assembly*, 97 REC. DES COURS 234, 249. II 1957.
169 ESC. Res. 75 (V), 5 August 1947.
170 ESC. Res. 728 (XXVIII) 1959.

intervention under Article 2 (7) of the Charter. We do not question here the soundness of those decisions. Suffice it only to say that in arriving at that decision the Council had assumed competence to interpret Article 2(7).

In the Indonesian Affair, (earlier discussed) the Security Council assumed competence to interpret Article 2(7) without recourse to the ICJ or any other organ. The Security Council adopted a Resolution stating that:

> "the Security Council noted with concern the hostilities in progress; between the armed forces of the Netherlands and the Republic of Indonesia ... and called upon the parties –
>
> (a) to cease hostilities forthwith, and
> (b) to settle their disputes by arbitration or by other peaceful means and keep the Security Council informed about the progress of the settlement."[171]

This was despite Netherlands' protestations that the "police action" being taken against the Indonesian nationalists was a matter essentially within the domestic jurisdiction of the Netherlands, which was the sovereign in the region concerned and that the Security Council did not possess the competence to intervene on the ground that it was prohibited from doing so under Article 2(7).

The fact that the Security Council could proceed as it did, established the precedent that the Security Council could determine whether a matter before it was or was not one essentially within the domestic jurisdiction of a State.

171 SC Res. 459, 1st August, 1947.

We have of course in this Chapter already disposed of the competence of the International Court of Justice to interpret Article 2(7) resolving the question in the affirmative.

It is the view of the present writer that if it had been intended that a particular organ of the United Nations should be the one responsible for determining the application of Article 2(7) as was the case in the Covenant of the League of Nations, nothing would have been easier than to provide as much.

Similarly, the consensual and non-binding nature of decisions of the U.N. organs (except the Security Council in respect of enforcement measures) raises questions as to why the drafters of the Article could not expressly provide that these organs would each make the determination when their jurisdiction was in issue.

In a sense, it appears from the records of San Francisco that only a compromise that left the issue shrouded in uncertainty was acceptable to all the parties. It is the fear of an overbearing and overly intrusive United Nations which led to an agreement that left a window open for a State to argue that her sovereignty demanded that she must determine for herself what matter is or is not essentially within her domestic jurisdiction.

If this indeed was the thinking instructing the drafting of Article 2(7), then the practice of the United Nations has dealt a big blow to that position as no organ of the United Nations has accepted such a contention by a State citing only Article 2(7).

5.3 Conclusion

To conclude the Chapter, we pose the question: Has practice (re) written the law? Can we now legitimately amend Article 2(7) to provide that the United Nations organ seized of the matter shall make a determination whether a matter is or is not within the domestic jurisdiction?

PART II: SOME REFLECTIONS ON THE APPLICATION OF ARTICLE 2(7)

CHAPTER 6

ON THE INTERNATIONAL FINANCIAL INSTITUTIONS AND ARTICLE 2(7)

6.1 Status and History of the International Financial Institutions

In the first Part of this thesis, we have interrogated the meaning of Article 2(7) and how it was intended to work. In this part, we want to examine the workings of Article 2(7) in the context of contemporary global problems.

In this Chapter in particular, we are interested in the application of Article 2 (7) vis-à-vis the operations of International Financial Institutions (IFIs) and more particularly the IMF and the World Bank. We have to answer these three questions among others. How did these United Nations Financial Institutions come about? Are these Institutions subjects of the Charter in such a manner as to be bound to observe the prohibitions imposed by Article 2(7)? If that is so, to what extent have these Institutions been bound by Article 2(7) of the Charter?

The preliminary matter to be disposed of first, is of course that of defining the exact standing of the IFIs within the rubric of the United Nations Organization.

The IFIs with which we are concerned are specialized agencies of the UN within the meaning of Chapters IX and X of the UN Charter. Under Article 55 of the Charter :

> "With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development.
>
> (b) solutions of international economic, social, health, and related problems, and international cultural and educational cooperation.

Pursuant to Article 57 of the Charter –

> "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63."

Article 63 empowers the Economic and Social Council of the UN to enter into agreements with any of the Specialized Agencies defining the terms on which the agency concerned shall be brought into relationship with the United Nations.

Both the IMF and the World Bank were brought into relationship with the UN as its specialized agencies to operate on the basis of their Articles of Agreement. It follows that these IFIs and any others enjoying that status are bound by the Charter. Nothing would be more bizarre than an argument

that whereas the Charter binds the Organization and all members, it does not bind the specialized agencies generally, or any particular one. Fortunately, no such argument has ever been seriously canvassed. In any event, Article 103 of the Charter is clear that Charter provisions prevail over those of other Agreements.

The result is that the IFIs are bound by the Charter and by the prohibition against intervention in essentially domestic matters under Article 2(7).

The IFIs we shall examine are commonly called the Bretton Woods Institutions; that is the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development – IBRD (the World Bank).

Following detailed negotiations between Britain and the United States of America commencing around 1942, the two countries issued a Joint Anglo – American Statement on the Establishment of an International Monetary Fund in 1944 and thereafter held consultations with several other governments on the ideas contained in these proposals. The United States then invited 43 countries to attend a United Nations Monetary and Financial Conference to be held in Bretton Woods, New Hampshire, from 1st July 1944. It was at the famous Bretton Woods Conference that the IMF and the World Bank were born.

It is very instructive to note that this Conference with only very minor changes adopted the key provisions of the Joint Anglo-American Statement

into the Articles of Agreement of the Fund.[172]. This is no idle point for the purposes of the present discussion: As Nassau A. Adams observes -

> "...the Bretton Woods Conference, the crucial negotiations that preceded it, and the issues that came forth from it were very much an Anglo-American affair. Moreover, the United States was throughout the dominant partner, not only in the leadership it had shown in developing and promoting the proposals for these institutions, but also by virtue of the fact that, it alone had the resources to make these institutions work, and was therefore in a position to impose its views at all critical stages in the Anglo-American negotiations...It goes without saying that the influence of the underdeveloped countries on these negotiations and on the nature of the institutions that emerged was nil or negligible."[173]

It must be recalled that most of Africa was at the time of the Conference still under European colonial rule. It is not difficult to see how America took control of the establishment of these institutions from the onset. The Second World War had just ended leaving Europe in ruins. The only big power whose territory had been spared by invasion and bombardment and whose economy had in fact been boosted by the war was the United States. It was in the interest of the U.S after the war to increase its economic power by allowing its capital to be invested abroad and by expanding its economy on a world scale.

In order for the U.S to achieve its designs, it was necessary first to dismantle all the barriers, which over the years had been erected in the world community by states increasingly bent on protectionism. The U.S.

172 R. N. Gardner, *Sterling-Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of Multi-lateral Trade* (Oxford, Clarendon Press 1956).
173 A. N. Adams, *Worlds Apart, The North-South Divide and the International System* (London: Zed Books, 1993): 22.

was therefore constrained to launch a free trade and free market philosophy which it forced other states to accept.

Cassese puts it very aptly:

> "...[the U.S.] succeeded in having three important international institutions established for the purpose of creating the necessary mechanisms for realizing that philosophy (of free trade and dismantling of barriers) on a multilateral, stable and continuing basis --- the IMF was given the task of ensuring international monetary stability: it was to ensure that single states did not alter international trade conditions by monetary contrivances designed to protect the national economy at the unfair expense of foreign countries ... the World Bank was given the task of mobilizing and collecting money from private sources on the international capital market with a view to lending it to those states most in need of foreign investment. The third organization (with which we shall not deal) was intended to abolish traditional tariff restrictions on free trade which greatly hampered free competition on the World Market: It was the General Agreement on Tariffs and Trade (GATT)."[174]

For the purposes of our discussion, it is clear that from the onset these IFIs were established on principles, setting them on a collision course with the concept of leaving certain matters such as tariffs to the domestic jurisdiction of a State. Secondly, quite clearly these institutions were established without having in mind a sizeable part of the contemporary international community, sections of which had not come into existence as independent states.

The IMF, the World Bank and GATT were not specifically geared to the promotion of development in backward nations and by their guiding

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[174] Cassesse, (1986): 103.

principles were to a large extent always headed for misgivings from under-developed countries.

6.2 The International Monetary Fund

The "Articles of Agreement" or the Treaty establishing the IMF was concluded in 1944 and entered into force on 27th December 1945. By this treaty, the previously unrestricted sovereignty of States in monetary matters was seriously limited in the Articles of Agreement by a set of obligations:

By agreement with the IMF, the currency of each Member was assigned a par value expressed in terms of gold or in terms of the U.S. dollar of the value in effect on 1st July 1944. Each country undertook to maintain this par value for its currency. Gold was the common denominator of the system in that exchange rates were pegged to a par value in gold.

Changes in par value could be made only to correct a "fundamental disequilibrium" in the balance of payments after consultation with the IMF and with its concurrence. Each Member State had to ensure that foreign exchange dealings between the currencies of other Members and its currency, which took place on its territory, were based on parity. Members were to refrain from introducing restrictions on payments or transfers for current international transactions as defined by the Articles, multiple currency practices or discriminatory arrangements, unless unauthorized by the Articles or approved by the Fund. Also, members were required to subscribe quotas assigned by IMF, to be paid to IMF partly in gold (25%) and partly in the State's currency (75%).

With regard to the organizational and power structure of the IMF, although it is a U.N. Specialized Agency, the Fund differs sharply from the U.N. as regards both its composition and its decision – making process. The IMF is largely dominated by the Western industrialized countries. The central organ of the IMF is the Board of Governors consisting of a Governor and an alternate appointed by each Member State. The Governor is appointed by the Member Country and is usually the Minister for Finance or the Governor of the Central Bank. Most of the Fund's powers are vested in the Board of Governors, which Board can delegate them to the Executive Board. In practice, the Board is the most important organ of the IMF. The Executive Board is as at present[175] made up of 24 Directors, eight of whom are appointed by the five countries having the largest quotas (the U.S. (17.10), the U.K. (4.95), Germany (6.00), France (4.95) and Japan (6.14) plus Saudi Arabia, China and Russia and sixteen who are elected at two year intervals by the other members through the formation of constituencies.

If the traditional voting in U.N. organs was adopted, the majority of its 184 members in control of the Fund would be along similar lines as in the General Assembly. However, the IMF uses a weighted voting system based on members' quotas and consequently, the voice of the wealthiest nations is stronger than that of the others. Each member is allotted the same basic number of votes, namely 250; additional votes are allocated in proportion to a country's quota or to a country's special drawing rights. The upshot of this is of course that the most important decisions of the Fund can only be made with the consent of the big industrialized countries.

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175 20th May, 2004.

But our concern is more serious than that. It is that the IMF has taken upon itself a mandate outside the restrictions of Article 2(7), which we contend should bind the Fund. To do this, it is worth going back to the original Articles of Agreement of the Fund. The purposes of the IMF are:

> (a) to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems;
>
> (b) to facilitate the expansion and balanced growth of trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of productive resources of all members as primary objectives of economic policy;
>
> (c) to promote exchange stability to maintain orderly exchange arrangements among members and to avoid competitive exchange depreciation;
>
> (d) to assist in the establishment of a multilateral system of payments in respect of currency transaction between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade;
>
> (e) to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments; and in accordance with the above to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.[176]

[176] IMF Articles of Agreement, Article 1, Purposes, IMF website www.imf.org.

It is interesting to note that these statutory purposes remain the same as they were formulated in 1944.

Nicola Bullard, Walden Bello and Kamal Malhotra[177] argue that these Articles of Agreement say nothing about trade and investment liberalization, privatization, foreign investment or public sector austerity measures all of which have become central to the IMF's demands. And yet the Fund is required to be guided in all its policies and decisions by these purposes!

How did this come to be so? Nassau A. Adams[178] argues that although the IMF as conceived was to play a major role in the restoration of economic equilibrium after the war, it became apparent that the Fund could not play this role. Whereas the Fund was supposed to grant assistance for short-term stabilization, in the aftermath of the war, what was really needed was assistance for reconstruction.

A major shift in American policy spurred on by political developments in Europe led to the launching of the European Recovery Programme (the Marshall Plan) under which the United States undertook to provide massive reconstruction aid to Europe under bilateral programmes outside the framework of the World Bank in the process sidelining that Bank as far as reconstruction loans were concerned.[179]

177 N. Bullard, W. Bello, and K. Malhotra, *Taming the Tigers: The IMF and the Asian Crisis, Focus on the Global South*, (London, CAFOD, 1998).
178 Adams, (1993).
179 Adams, (1993).

At the same time, special intra – European payment arrangements were devised to facilitate intra – European trade and to overcome the disruption of trade caused by the dollar shortage and the inconvertibility of most European currencies. The effect was to help equilibrate the balance of payments of the war torn European countries at higher levels of production and trade and to facilitate the transition to convertible currencies and trade.

It is clear that issues of sovereignty and intrusion into the domestic affairs of states were always of concern in relation to the Funds' activities and accounted in large measure to the refusal by the European countries undergoing recovery and reconstruction to make use of the Fund.

The point was well put by the U.K. Executive Director in October 1948 when he drew the attention of the IMF Board to the increasing number of interpretations reading into the Fund Agreement, limitations, which were not in the text. Because of such limitations, the Fund was now of no use to its members, it carried obligations but no benefits.

Yet the resistance to conditionalities was not an afterthought on the part of the parties concerned. It is an issue that had divided the American and British negotiators during the early stages of the establishment of the Fund. The British argued that the facilities of the IMF needed to be available to a member as a matter of right, a view that was shared by the other negotiators with the exception of the United States. When agreement was not easily forthcoming, the IMF was established but with statutes sufficiently ambiguous to leave the matter unresolved.

As we have observed, the Articles of Agreement of the Fund only adumbrate the rights and obligations of members in rather broad terms leaving these to be defined and made operational in the policies and management of the Fund. On the fundamental question of conditions for access to the Fund's resources, the Articles are shockingly vague, leaving countries seeking to access these resources, invariably, the so-called Third World countries at the very tender mercies of the Western dominated management of the Fund.

The paradox of history is remarkable! The countries such as Britain and Germany which most fervently resisted the IMF's activities in its early years because they could not countenance interference in their domestic affairs, among them economic policymaking, now control the Fund and have proceeded to prescribe a most intrusive and meddlesome policy of conditionality for the use of its resources.

The world finds itself in the odd situation where an international organization has assumed authority over what are certainly domestic affairs of states in a manner adverse to their sovereignty and more particularly, in a manner violating Article 2(7) of the United Nations Charter.

To understand better how the international financial institutions ride roughshod over the domestic jurisdiction Article, let us briefly examine the handling of two specific cases by the IMF.

6.3 The IMF and the Asian Crisis

The Asian crisis refers to an economic situation that occurred in some countries of Asia, namely, Thailand, South Korea and Indonesia in the period of 1997 –1998. It was marked by severe financing needs by these countries stemming from sudden loss of market confidence and was reflected in huge capital outflows. Millions of people were thrown out of work and decades of social progress were thrown into disarray. In Indonesia, the long-term viability of the nation was put at stake as the economy collapsed and food riots and protests spread.

The Asian crisis was really a crisis of the IFIs, and in particular of the International Monetary Fund. The IMF prescribed defective and socially disastrous remedies for the problems afflicting the region, took the opportunity to grossly exceed its mandate, as laid out in its Articles of Agreement and showed itself both arrogant and far too close to the interests of its principle shareholder, the U.S.A. The result of the Fund's failures was to exacerbate the impact of the crisis.

Let us briefly examine the IMF's interaction with each of these countries.

6.4 Thailand

As late as the second half of 1996, the IMF was praising the Thai authorities for their consistent record of sound macro-economic management policies. The IMF and the World Bank had been instrumental in promoting Thailand, with its openness to capital flows and its high growth rate as a model of development for the rest of the Third World. At

the time when the crisis struck in 1997, Thailand had moved relatively far down the road to the full financial liberalization, urged on it by the IMF.[180] The measures taken on the recommendation of the IMF included:

a) the removal of ceilings on various kinds of savings and time deposits.
b) fewer constraints on the portfolio management of financial institutions and commercial banks such as replacing the reserve requirement ratio for commercial banks with the liquidity ratio,
c) dismantling of all significant foreign exchange controls, and
d) looser rules on capital adequacy and expansion of the field of operations of commercial banks and financial institutions.[181]

For a while, things seemed to work until everything began going wrong in mid 1997 when the Thai currency, the "baht," collapsed in early July 1997. Of particular interest for the purposes of our discussion were the prescriptions offered by the IMF to fix the crisis in Thailand. In return for the Fund's resources (about $ 17 billion), Thailand had to agree to:

a) a stabilization program that would cut the current account deficit through the maintenance of high interest rates and the achievement of a "small overall surplus in the public sector by 1998" through an increase in the rate of the Value Added Tax to 10 percent, expenditure cuts in a number of areas and ending subsidies on some utilities and petroleum products;

180 Bullard, (1998): 6.

181 P. Vichyamnond, "Thailand's Financial System: Liberalization and Structure," *TORI*, Bangkok (1994): 3.

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180 Bullard, (1998): 6.

181 P. Vichyamnond, "Thailand's Financial System: Liberalization and Structure," *TORI*. Bangkok (1994): 3.

b) separation, suspension and restructuring of unviable financial institutions including the closure of insolvent financial institutions.[182]

We argue that these conditionalities belonged to the competence of the municipal law of Thailand and it was unacceptable for a UN organ to so callously contravene Article 2(7) by intervening in these domestic matters. But there was more: With regard to the actual use of the resources (the $17 billion), the IMF made it a condition of its 20th August, 1997 agreement with Thailand that the money would be devoted solely to help finance the balance of payments deficit and rebuild the official reserves of the Bank of Thailand.

Other measures imposed by the Fund included:

a) a demand in November, 1997 that the National Assembly of Thailand pass four emergency decrees that were necessary to get the financial restructuring going;

b) a demand in early 1998 that the Thai Alien Business Law be amended to allow foreigners more liberal investment privileges in the non-financial sectors of the economy, to tighten up the country's bankruptcy laws, and to speed up the total or partial privatization of key state enterprises.

182 IMF, "IMF Stand-by Credit for Thailand," Press Release No. 97/37, August 20, 1997 as quoted Bullard et al (1998): 8.

As our study in Part I of this work has shown, all of these conditionalities entirely violate Article 2(7) of the United Nations Charter on domestic jurisdiction. Needless to say, Thailand, (like any other country finding itself in such a tight spot) had to comply with these demands!

6.5 Indonesia

Just as in the case of Thailand, the IMF was as late as September, 1997 praising economic development in Indonesia.[183]

When the Thai *baht* collapsed in 1997, a "contagion" effect resulted causing currencies and economies in the region to collapse. The weaknesses in the Indonesian economy that made it vulnerable to currency attacks were similar to those of Thailand.

When Indonesia sought IMF assistance, a $ 43 billion loan was offered on 31st October, 1997 but on the condition that Indonesia pursued a tight monetary policy and adhered to a catalogue of other far reaching conditionalities.[184]

But what later transpired is what concerns us more. After a few months of the IMF bailout, things were still gloomy, as investors did not have confidence in the resolve of Suharto's government to stay on course with the IMF conditionalities. Indeed on 6th January 1998 President Suharto

183 World Bank Country Brief, September 1997, World Bank website.

184 IMF Press Release NO. 97/50 "IMF Approves standby Credit for Indonesia," 5th November, 1997 as quoted in Bullard et al (1998): 18.

delivered a budget speech whose effect was to renege on the loan conditionalities imposed (the IMF would say "negotiated") with the IMF.

Reaction was swift: the IMF flew in high-level officials to compel President Suharto to withdraw his budget promises and immediately reaffirm his commitment to the IMF conditionalities. President Suharto also received telephone calls from U.S. President Bill Clinton, Japanese Prime Minister, Fujimori Hashimoto, Australian Prime Minister, John Howard and German Chancellor Helmut Kohl all "urging" him to revise the budget and stick to the IMF conditionalities.

The ceding of sovereignty to the IMF and "its owners" was very aptly summarized as follows:

> "Using tremendous pressure, the IMF was able to extract a new commitment from President Suharto on 15th January, 1998, powerfully captured in the photograph of IMF Managing Director Michael Camdessus, arms crossed with the demeanour of an invigilator, imperiously standing over Suharto as he signed on the dotted line."[185]

6.6 South Korea

South Korea was the next country to be afflicted. Because of South Korea's closeness to the U.S. and its political importance to the US, the IMF wasted no time in responding to Seoul's call for assistance. According to one writer[186] the conditions for the rescue of South Korea were worked out by

185 IMF Press Release NO. 97/50 "IMF Approves standby Credit for Indonesia," 5th November, 1997 as quoted in Bullard et al (1998): 21.
186 Michel Chussodovsky, "The IMF Korean Bailout," Dept. of Economics, University of Ottawa, (21st January 1998).

the U.S. Treasury, the U.S. Chamber of Commerce, Wall Street bankers and key European banks. This is itself, if true, quite instructive about the workings of the IMF.

The key elements (conditionalities) imposed on South Korea in the IMF package were:

a) tightening monetary policy to restore and sustain calm in the markets;
b) raising interest rates from 12.5 per cent to 21 per cent to reign in liquidity;
c) controlling money supply to contain inflation at or below 5 per cent;
d) increasing the value added tax and expanding corporate and income tax bases;
e) opening domestic markets;
f) allowing foreign banks and financial institutions to set up wholly owned branches in South Korea;

In addition to these, ostensibly fiscal and monetary policies, the "agreement" included a long list of institutional reforms including establishing an independent Central Bank and closing troubled financial institutions. South Korea was also required to review its corporate governance and corporate structure and also by legislation, to initiate labour market reform.

With Presidential elections approaching, the IMF was callous in its disregard for South Korea's political sovereignty. The IMF asked all

Presidential candidates to sign a written pledge that if elected they would abide by the IMF's conditionalities. It is useful to note that all the candidates actually did sign the pledge except the eventual winner who stated that he "agreed in principle but subject to further negotiations."

There can be little doubt that in the case of South Korea as in that of Thailand and Indonesia an agency of the United Nations intervened in the (economic, social and political) domestic jurisdiction of states in a manner outlawed by Article 2(7).

The IMF interventions entirely disregarded the regional integration scheme of Southeast Asia, the Association of Southeast Asian Nations (ASEAN) which might have offered solutions with a local flavour. As matters turned out, the conditionalities imposed by IMF imposed risks to these countries' self rule and negated their Sovereignty-undermining a core value of ASEAN. [187]

We argue that there was no **real** consent by these states to this kind of intervention.

6.7 Kenya

The case of Kenya also presents a good example of the treatment, which poor states suffer at the tender mercies of the international financial institutions. Throughout the 1990's and extending to the early 2000's Kenya was denied access to IMF resources for failure to meet

187 Eddy Badrina, "The Implications of the Asian Financial Crisis on ASEAN Unity" http://www.wehner.tamu.edu/mgmt/www/nafta/spring99/Groups/eddy/final.htm. (15th January 2004).

conditionalities imposed by the IMF. These conditionalities ranged from demands to curb corruption and privatize non-profitable state enterprises to demands for good governance (as determined by who?) and to have certain legislation passed by the Parliament of the Republic of Kenya.

Now, if there is one thing on which there can be no disagreement, it is that the enactment of a state's municipal law is purely a domestic matter to be determined by that state through its constitutionally provided legislative processes.

In spite of this, the IMF required the Republic of Kenya as a condition to accessing its funds, to pass legislation on certain specific matters including:

a) legislation entrenching in the Constitution an Anti-Corruption Authority.
b) legislation to deal with corruption and economic crimes.
c) legislation to provide for the professional ethics of public officers including declaration of wealth by those officers.

This, we argue, is plainly unacceptable from a United Nations agency, which has any deference to Article 2(7).

But that is hardly all, in the year 2000, the then President of Kenya, Daniel Arap Moi and the Attorney General separately admitted in public that not only had the IMF insisted on the passage of certain genres of legislation, the IMF had itself procured the requisite Bills to be drafted and had handed these to the Government with instructions that these be passed in

substantially the same form as presented! One such Bill (The Constitution of Kenya (Amendment) Bill, 2000) could not be considered by the National Assembly because it lacked the enacting formula required by the Constitution of Kenya. This was the clearest evidence that the Bill had not been drafted by the Government's draftsmen. Disregard for the domestic jurisdiction Article does not get worse than this!

Nor did this arm-twisting end with the Moi Regime.

On 6th March, 2003 the new ruling party's (Narc's) Parliamentary Group Meeting was faced with a decision whether to make constitutional review and the enactment of a new Constitution for the Republic of Kenya the priority in the National Assembly's business, a promise on the crest of which the party had ridden to electoral victory or to pass legislative amendments aimed at combating corruption first. The latter, it was well understood was a conditionality for resumption of funding by the Bretton Woods Institutions. After much argument in which Kenya's sovereignty was much invoked and little heeded, the matter had to be settled in favour of "obeying" the command of the Bretton Woods institutions.

6.8 The World Bank

Founded in 1944, the World Bank Group is one of the World's largest sources of development assistance. The term "World Bank Group" encompasses five closely linked associations, namely:

a) the International Bank for Reconstruction and Development.
b) the International Development Association.

c) the International Finance Corporation.

d) the Multilateral Investment Guarantee Agency.

e) the International Centre for Settlement of Investment Disputes.

The term "World Bank" refers specifically to two of these five, namely: the International Bank for Reconstruction and Development and the International Development Association.

We are concerned here with the "World Bank" rather than the "World Bank Group" and more particularly so the International Bank for Reconstruction and Development, which for the purposes of this discussion is the "World Bank."

Under it's Articles of Agreement at Article 1, the purposes of the Bank include:

i. to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the re-conversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries

ii. to promote long range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.

The Articles of the Bank retain the early orientation of the Bank at conception as aiming mainly at financing the reconstruction of economies ravaged by war. The words "and the encouragement of the development of

productive facilities and resources in less developed countries" were in fact a late addition to the Articles and were only added at the insistence of the Latin American delegations. Only when reconstruction financing was abandoned did the Bank's focus shift to development financing, and this soon became the principal function of the Bank.

The grip of the US is even firmer on the World Bank than it is on the IMF. The headquarters of the Bank is in Washington in the US, and the U.S., the principal shareholder, has arrogated to itself the right to appoint the President of the Bank (who in practice has invariably been a U.S. national) without consulting the Bank's other members - notwithstanding the formal requirement in the Bank's Charter that the President be elected by the Executive Board.

Mason and Asher have commented as follows:

> "...The administrative style of the Bank is unconventional and is particularly disturbing to ... nationals of countries other than the United States ... To them the Banks style appears autocratic, quixotic and distressingly disorderly. The top executive of the Bank dominates the organization and encounters few internal checks and balances. And while the executive directors must formally approve all loans, a project loan recommended by the President and staff of the Bank has never been rejected."[188]

A few cases illustrate the determination of the United States to translate its foreign policy considerations into actual influence over decision-making within the World Bank along with other IFIs.

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188 Mason and Asher, 86 – 87 as quoted in Adams, (1993).

6.9 Nicaragua

The Reagan Administration's opposition to IFI loans to the Sandinista regime in Nicaragua provides apt example of the machinations of the U.S. During the years 1977 –85, the U.S. voted against seven loans to Nicaragua from various IFIs including two from the World Bank. On each occasion the U.S. cited "inadequate macroeconomic policies' as the reason for its opposition. It was however well known the world over that political considerations were responsible for the position of the U.S. In one case, according to the Centre for International Policy (CIP) in Washington DC,[189] U.S. officials regarded as technically sound a Nicaraguan request for a $16 Million loan from the World Bank for municipal development. However, Secretary of State Alexander Haig ordered a negative vote overruling even the U.S. Executive Director at the Bank. The intervention only failed because all other countries voted to provide assistance to Nicaragua.[190]

6.10 Ethiopia

Between 1977 and 1986, the U.S. consistently opposed World Bank loans to the Soviet-oriented Mengistu regime in Ethiopia on grounds of human rights violations in that country and also on grounds of an expropriation dispute with that country.[191]

189 CIP, World Bank – Nicaragua, Aid Memo, 10th March 1982, 1 as quoted in Carter, (1988).
190 CIP, World Bank – Nicaragua, Aid Memo, 10th March 1982: 166.
191 CIP, World Bank – Nicaragua, Aid Memo, 10th March 1982: 168.

6.11 Chile

Efforts by the U.S to apply pressure on the leftist Salvador Allende regime in Chile using the World Bank were quite effective during the early 1970's. On the instigation of the U.S., the World Bank, previously a major lender to Chile provided no new loans during the Allende reign.[192]

The World Bank is thus an international bank only in a very broad sense of the word. It manifests very potently what has been described[193] as the irony of the Bretton Woods system which combines a formal symmetry of treatment as regards compliance with rules and obligations, with an obvious asymmetry as regards influence and control – formal equality of rights and obligations co-exists with unequal influence and control.

Under Section 4 of Article III of the Bank's Articles of Agreement the conditions on which the bank may guarantee or make loans include, that:

> (v) in making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and if the borrower is not a member, that the guarantor, will be in a position to meet its obligations under the loan, and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

There is no mention of any authorization to the Bank to impose the conditionalities identical to those of the IMF, which it does in practice impose. In fact, the Charter provides that:

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192 P. Sigmund, "The Invisible Blockade and the overthrow of Allende," *52 Foreign Aff.* (1974): 322.
193 Adams, (1993): 124.

> "the Bank and its officers shall not interfere in the political affairs of any member nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions ..."[194]

But like the IMF, the World Bank has taken the liberty to impose conditionalities which contravene Article 2(7) of the Charter. In the case studies of Thailand, Indonesia, South Korea and Kenya, the World Bank would not come to the rescue of these countries, when the IMF was displeased with them, which in a sense meant that these were also the Banks' conditionalities.

Evidently, the IFIs have exceeded their mandate and have assumed the role of global policemen. As a former adviser of U.S. President Ronald Reagan has said:

> "Imposing detailed economic prescriptions on legitimate governments would remain questionable even if economists were unanimous about the best way to reform the countries' economic policies. In practice, however, there are substantial disagreements about what should be done."[195]

The IFIs should not use the opportunity of countries being "down and out" to override national political processes or impose changes that however helpful they may be, are not necessary to deal with the balance of payments problem and are the proper responsibility of the country's own political system.

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194 Article 4, section 10.
195 Martin Feldstein, "Refocusing the IMF" Foreign Affairs, March/April 1998 as quoted in Adams (1993): 124.

One economist[196] has argued that the IFIs should ask three questions when imposing conditionalities, namely:

(1) Is this reform really needed to restore the country's access to international capital markets?

(2) Is this a technical matter that does not interfere unnecessarily with the proper jurisdiction of a sovereign government?

(3) If the policies to be changed are also practised in the major industrial economies of Europe, would the IMF think it appropriate to force similar changes in those countries if they were subject to a Fund program?

The conditionalities imposed by the IFIs have gone far beyond their mandate by demanding, structural, policy and political reforms unrelated either to their roles as set out in their Articles of Agreement or to the causes of the economic crises afflicting the concerned countries. Most regrettably, the IFIs have disregarded a cardinal principle on which the United Nations is predicated – Article 2(7). There is therefore a strong case for limiting conditionality to the balance of payments.[197]

6.12 Conclusion

To conclude, for these institutions to become more effective managers of the global economy for the common good, they need to re-focus on their respective mandates, and to increase their legitimacy. They can increase

196 Feldstein, (1993): 20.

197 J. P. Renniger, (ed), *The Future Role of the UN in an Interdependent World*, (Netherlands: Kluver Academic Publishers, 1989).

their legitimacy by respecting international law including all the provisions of the U.N. Charter. As matters currently stand, the IFIs although they are organs of the UN and subject to the Charter, have disregarded the provisions of Article 2(7) of the Charter.

CHAPTER 7

EXIT LAW, ENTER. IDEOLOGY, POWER AND DEFIANCE

"At the same time we must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. We must try to act in concert with other organizations, and with respect for their principles and purposes But the Alliance [NATO] must reserve the right and the freedom to act when its members, by consensus, deem it necessary.[198]

7.1 Article 2(7) and the Use of Force

In the first six Chapters of this study, we have sought to clarify the meaning and scope of the prohibition against intervention in matters essentially within the domestic jurisdiction of any State that is imposed by Article 2(7) of the Charter. In Chapter 4 in particular, we have explained what is meant by "intervention."

A preliminary issue we must interrogate, is a question on the subjects of the prohibition against intervention. Who is prohibited by Article 2 (7) from intervening in matters which are essentially within the domestic jurisdiction of a state? Is the prohibition directed at the United Nations Organization (qua United Nations) only or is it also directed against individual member states of the United Nations?

One of the enduring problems in the interpretation of the Charter generally, relates to the convoluted use of the terms, "the Organization" in some Articles. "all Members" in other Articles and "the Organization and its Members" in yet others.

In Article 2(7) the expression used is "Nothing contained in the present Charter shall authorize the United Nations to intervene ..." Does this prohibition extend to individual members or is it, as has been argued by some commentators, only

[198] Strobe Talbat, US Deputy Secretary of State as quoted in Whitman, (2000).

binding on the Organization. By extension, the question whether the rights and obligations of the Organization are synonymous with those of its members, may also arise. But this is probably stretching the debate too far. It cannot be contested that under international law, an international organization does enjoy a separate legal identity and personality from its members. This separate legal personality carries with it concomitant (separate) rights and duties. A debate along these lines is therefore probably superfluous. The core question of focus should be only whether, and if so, on what basis, the prohibition at Article 2(7) should apply to individual member states of the United Nations.

To hold that the prohibition applies only to the United Nations is in my view untenable. The Charter is a treaty and a cardinal principle of treaty interpretation is that the parties must be presumed not to have intended to nullify or stultify a treaty by defeating its very purpose.

The preambular part of Article 2 of the Charter provides as follows –

> The Organization and its Members in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles ....

Article 1 (1) of the Charter on the other hand lists as one of the Purposes of the United Nations –

> To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Considering that Article 2(1) makes it clear that the Organization is based on the principle of the sovereign equality of all its members, it is quite clear that

intervention (as we have defined it in Chapter 4) by one member in matters essentially within the domestic jurisdiction of another member as envisaged in Article 2 (7) would be a violation of the Purposes of the United Nations in terms of Article 1 (1), as well as a violation of Article 2 (1). If such intervention by a member takes the form of the threat or use of force, it further violates Article 2 (4).

Article 26 of the Vienna Convention on the Law of Treaties, encapsulates the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*). Unlawful intervention in the domestic affairs of another state can hardly be said to be a *bona fide* observance of the Charter.

This Chapter therefore proceeds on the premise that a proper interpretation of the Charter as a whole, leads to no other reasonable conclusion, but that the drafters of the Charter intended that member States be free to act in those matters within their domestic jurisdiction devoid of intervention either from the Organization or from other member states.

An interpretation of Article 2(7) that allows a member to intervene in another's domestic affairs on the ground that only the United Nations and not the member is prohibited from so doing by the Article, would render the entire Charter meaningless as the Purposes of the United Nations would be defeated.

A member state might then argue that the right to intervene in matters within the domestic jurisdiction of another member, is itself a matter essentially within the former's domestic jurisdiction and outside the scrutiny of the United Nations in terms of Article 2 (7). We are not persuaded that so momentous an absurdity could have been intended.

Whichever way one approaches the subject of intervention, it has to be admitted that one of the most severe forms of intervention is that by the use of force against a sovereign State. The drafters of this Charter were very much alive to this fact and expressly forbade this form of intervention at Article 2(4) of the Charter which provides as follows:

> "All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any State, or in any manner inconsistent with the purposes of the United Nations."

In this Chapter, we approach the prohibition at Article 2(4) as a special form of the more general prohibition at Article 2(7) and explore international practice in regard to the prohibition of the use of force and particularly where that use of force constitutes intervention within the meaning of Article 2(7).

During the early years following the drafting of the Charter there seems to have been general agreement as to what Article 2(4) entailed. Article 2(4) was understood to outlaw war and other acts of armed aggression by one State against another; it also forbade lesser forms of intervention by force by one State in the territory of another. Apart from collective action under the auspices of the United Nations to enforce the peace, the only lawful use of force by a State was to be that contemplated under the limited exception in Article 51 permitting the use of force in self-defence against an armed attack

Article 51 of the Charter provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the united Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority

> and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Our concern in this Chapter arises from the practice that has evolved in regard to interventions by the use of force. Article 2(4) has been interpreted especially by powerful States (weak and poor States are incapable of using force to achieve their ends or purposes) in ways that have sought to justify intervention in the domestic affairs of weaker States for certain purportedly "benign" or "benevolent" purposes. Where such an interpretation has been impossible by any stretch of the imagination, powerful States have simply ignored the prohibition of intervention by the use of force and proceeded to attack weaker States as if might were right.

Such States have surprisingly however condemned other States when they have used force in similar circumstances and used their clout to proceed against those States in various organs of the United Nations. Ultimately, we argue that in regard to the use of force, the prohibition against intervention has been reduced to no more than a propaganda tool, a play stage of ideological warfare, a farce that does not bode well for the future of Article 2(7). We do this by considering several cases of the use of force and the accompanying arguments that dominated the world arena in relation to them.

Prof. Henkin has commented on the wording of Article 2(4) as follows:

> "One initial ambiguity appears on the face of Article 2(4). Does the prohibition of the use of force against "the territorial integrity" of another State forbid only a use of force designated to deprive that State of territory or does it also prohibit force that violates the territorial borders of that State, however temporarily and for whatever purpose? Does the prohibition of the use of force against "the political independence" of another State outlaw only a use of force that aims to end that State's political independence by annexing it or rendering it a puppet or does it also prohibit force designed to coerce that

> State to follow a particular policy or to take a particular decision? .... Another debate concerned whether economic pressure – an oil embargo, a boycott, or other sanctions designed to derogate from a State's territorial integrity or political independence is a "use of force" prohibited by Article 2(4)."[199]

Prof. Henkin observes that an effective United Nations system, or a court with comprehensive jurisdiction and recognized authority might have answered these questions by developing the law of the Charter through construction and by case application. However, in the absence of such authoritative interpretation, the meaning of the Charter has been shaped by the actions and reactions of States and by the opinions of publicists and scholars.

From the onset, interpretation of Article 2(4) has pitted the West and the others (notably Third World States) in diametrically opposed positions. The former preferring a narrow interpretation and the latter a broad all encompassing interpretation. While Western States were broadly satisfied with the Article as creating a right of all member States to non-intervention in their internal or external relations by the threat or use of force, Latin American States, and socialist countries and later joined by African and Asian States from the 1950s made more and more demands for recognition of the prohibition of other forms of intervention.

In their view, illegal interference by powerful States in the freedom of other countries does not only take the form of sending or threatening to send, military aircraft and warships, these states can and do also impose their will on weak or ideologically incompatible nations through economic pressure or even economic coercion, through political destabilization; by instigating, fomenting and financing domestic unrest. Western countries, it is also asserted, increasingly interfere in the

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[199] Louis Henkin, "Use of Force: Law and US Policy," in Right V. Might, 1989, *Council on Foreign Relations*, reprinted in Carter B. E. and Trimble P. R, *International Law* (2nd Edition) (Little Brown and Company, 1995): 1304.

domestic affairs of other states under the guise of concern for human rights: they disturb the national set-ups of their former colonial regimes applying pressure in various ways on state authorities under the pretext that they are disregarding human rights.[200]

The view held by the Western countries was that the other states were trying to re-write international law. They took the view that international law only prohibited intervention by force or by the threat of force, or dictatorial intervention maintaining that states were and should continue to be free to influence the policies and actions of other countries.

The clash between these opposing views manifested itself in the 1960s in the debates in the General Assembly, and in the Special Committee on Friendly Relations. The upshot of the lengthy discussions and negotiations was the adoption on 20th December, 1965 of the Resolution containing the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"[201] and the inclusion in the Declaration on Friendly Affairs of 1970[202] of a principle on this matter and again in 1981 by the General Assembly[203] thereby arousing a strong opposition in the West mainly for the restrictions on the promotion of respect for human rights, derived from the principle of non-intervention in domestic affairs of states.

The text of the Resolutions on which general consensus was reached shows that all in all, it was the Third World and the Eastern European countries which prevailed in the end.

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200 Cassese, op cit., note 143, p. 145.

201 Resolution 2131 (xx).
202 GA Res. 2625 24th October, 1970.
203 GA Res. 36/103 9th December, 1981.

To a certain extent, however, this was a Pyrrhic victory, for the price paid by the two dominant groups was the extreme looseness of the wording. The provisions prescribing non-armed intervention are so woolly that it proves difficult to establish what categories of interference are actually prohibited.[204]

7.2 Eroding the Prohibitions of Article 2(4)

Economic and political globalisation are inevitably accompanied by a kind of "ideological globalisation", i.e. a transnational ideology used to justify the decrease of national sovereignty, which complements the corresponding decrease of economic sovereignty following economic globalisation. The core of this new ideology is the advent of a doctrine of "limited" sovereignty used to "justify" military interventions against any "rogue" regimes.

Powerful states have over time been systematically chipping away at the prohibitions of Article 2(4) in essence seeking to set up a body of permitted interventions by the use of force – in addition to the self-defence exception under Article 51. These purported exceptions can be listed as:

(a) humanitarian intervention
(b) intervention for democracy
(c) intervention in support of self determination
(d) counter-intervention
(e) intervention to fight terrorism and other crimes.

The list is not exhaustive. These "exceptions" merit some explanation and scrutiny.

204 Cassesse, (1986).

7.3 Humanitarian Intervention

Many scholars especially from the West argue that it has become more and more clear that the Charter contains a fundamental flaw: it is oblivious to barbarism of the most horrific sort, so long as that barbarism remains purely internal. The *idée fixe* at which the Charter's core prohibitions are directed is invasion, the paradigm being the 1939 German invasion of Poland. But the recurrent problem today, they argue, is not invasion. The problem today is intra-state violence, not inter-state violence.

Humanitarian intervention has been advocated. It is described as coercive intervention in the domestic affairs of a country that is undertaken without the consent of the government, with the intent to halt gross violations of human rights.[205]

Some states have claimed for themselves what has been variously described by scholars as a "right" or a "duty" to use force in "humanitarian intervention." The distinction between whether to characterize humanitarian intervention as a right or as a duty is a source of much academic debate. Some argue, that a right to intervention cannot be construed from the point of view of misuse of powers by a Government, because the "violation of a right, does not automatically vest a third person with either a duty or a right to correct the infraction.

Other scholars prefer to characterize humanitarian intervention as a duty on grounds that human rights law creates a duty to protect, promote and fulfil fundamental rights. This duty, it is argued, is primarily on the state where the infraction occurs and in the case of failure by that state to guarantee the rights, the duty shifts to the international community. It is further argued that as the intent of

humanitarian intervention, is to protect human rights, it is not conceivable that states have "rights" in the discourse of international human rights law. It is argued, that in international human rights law, states have only duties and obligations.[206]

The consequences of adopting either characterization are far-reaching. If humanitarian intervention is a right, this would create a discretion on the international community to choose whether to invoke the right or not in any particular situation of human rights violation. If on the other hand, it is characterized as a duty, then failure to act, as for example on the Rwanda Genocide of 1994, is a breach of that duty.

The flip side of this is, of course, that a state unwilling to do its "duty" in any such situation, would either dispute the existence of human rights violations, in fact, or play down the magnitude. Some commentators have argued that the Darfur Crisis in Sudan is one such example. If characterized as genocide, the situation would require action on the part of the international community. Yet, some powerful members of the international community are not enthusiastic to get involved. Such members would oppose characterization as genocide. Members who want to do their "duty" or who believe in a "right" of intervention would contrariwise spearhead a crusade for such a characterization.

Be that as it may. Henkin[207] argues that the international legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives. He gives the example of Israel's raid on Entebbe Airport in Uganda in 1976 to rescue hostages held on a hijacked plane as a paradigmatic example. In his view, this kind of

205 Ju-Hon Kwek, "Sovereign Rights and International Obligations: The Future of Humanitarian Intervention After Kosovo," *Journal of the Singapore Armed Forces*, Vol. 27 (April-June, 2004).
206 See for example, Kithure Kindiki, "Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in International Law," *Occasional Paper Series*, Vol. I. No. 3 (Eldoret: Moi University Press, 2003): 2
207 Henkin, (1989) in Carter and Trimble, (1995): 1305.

intervention is permissible not only by a state to save its own nationals, but also to liberate any hostages if the territorial state cannot or will not do so.

Humanitarian intervention is, as we shall observe a much beloved subterfuge of the West, which sees itself as duty bound to do what is "right".

The NATO intervention in Kosovo appears to have ushered in a new interventionism by which states are not constrained by the Charter when faced with "overwhelming humanitarian necessity".

Frank Furedi in a Chapter titled 'The Moral Rehabilitation of Imperialism has captured the pretensions of the West aptly:

> "The widespread acceptance in the West of military intervention in other parts of the world is testimony to the effectiveness with which Third World nationalism has been discredited. The discrediting of anti-colonial movement has at the same time underwritten the West's claim to the moral high ground. Today military intervention acquires legitimacy through the manipulation of such moral claims. Intervention is not justified on militaristic grounds, as a glorious imperial mission. It is rationalized on the plane of morality, as a humanitarian act. The ostensible intention of Western intervention today is to save the Third World from itself. Military intervention is a form of moral imperative. It is presented as a humanitarian gesture necessary to prevent famine, genocide or brutal aggression."[208]

The problem which has been created by the actions of benign or ethical imperialism is, of course, that it has seriously undermined the United Nations. That the most powerful state can lead its allies into a unilateral military onslaught without the express endorsement of the Security Council, means that brute force

208 Frank Furedi, *The New Ideology of Imperialism: Renewing the Moral Imperative* (London: Pluto Press, 1994): 110.

alone now determines whether any other state or combination of states might take unilateral action in their own interests.[209]

The hypocrisy of the West in applying this intervention was of course manifested by the case of the genocide in Rwanda when the whole world looked the other side as Satan descended on Rwanda and reigned for one hundred days.

In support of this limb of intervention, it has been argued that sovereignty is less absolute than in earlier times and that just as we now consider it right to intervene in families to prevent domestic violence, so it has become normal to override state sovereignty in cases of large scale violations of human rights.[210]

7.4 Intervention for Democracy

Some states have argued for a people's right to internal self-determination and have argued in essence that one state has the right to use force to preserve or impose democracy in another state. Although clearly contrary to the language of Article 2(4), this line of thought has, as we shall see, been pursued by some states. It is an interpretation that suggests that there are universal standards of democracy and that they are greater in importance than peace or the sovereignty or autonomy of any state.

The attraction of the assertion of humanitarian motive for intervention is that it distances its protagonists from scrutiny under "Just War" criteria. It gains moral weight at the expense of legal precision.[211]

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209 Ken Coates, "Benign Imperialism Versus United Nations", http://www.russfound.org/consult1/papers1/benign-imperialism.htm. (15th January 2004).
210 W. Alvarez, J. R. Gordon and A. Knight, "Article 2(7) Revisited," http://www.acuns.wlu.ca/publications/2.7/knight/knight.part02.shtml. (15th January 2004).

211 Jim Whitman, "After Kosovo: The Risks and Deficiencies of Unsanctioned Humanitarian Intervention" *The Journal of Humanitarian Assistance* (28th September 2000), http://www.jha.ac/articles/a062.htm. (17th January 2004).

Since the 1980s, this kind of intervention has been used in pursuit of far-reaching objectives. The need to protect ordinary people from local tyrants is now used as a pretext to dictate terms to Third World regimes.

As one writer has commented:

> "Now that the cold war is over and the Soviet Union is gone, Western governments and the international organizations they control are freer to place conduct requirements on sub-Saharan rulers."[212]

In these situations, intervention is justified on the grounds of assisting the restoration of democracy. Others demand intervention to prevent chaos and save ordinary people from the terrible predicament in which their leaders have placed them. In fact, in some cases powerful states have used the distaste for the ideological leaning of weaker states to attack them.

It is therefore clear that this new doctrine is false, asymmetrical and potentially oppressive. It is false, because placing the primacy of "human rights" over national sovereignty presupposes that we live in a society and a world in which the peoples of this world (and not their elites) can define the meaning of "human values". It is asymmetrical insofar as it creates a right for the powerful to intervene in the affairs of the weak, and not vice versa.[213]

The US and UN intervention in Haiti is an example of intervention under this head. Jean Bertrand Aristide, newly elected President of Haiti was deposed in a military coup in late 1991. The ex-President fled to the US as his country descended into anarchy and large-scale human rights violations.

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212 Jackson, R.H. "Juridical Statehood in Sub-Saharan Africa" Journal of International Affairs, vol. 46, no. 1, 1992, p.13.

213 T. Fotopoulos, (Editor), "New World Order and NATO's War against Yugoslavia" http://www.inclusivedemocracy.org/fotopoulos/bres_nps-yugo.htm. (17th January 2004).

The United States because of its geographical and historical ties with Haiti pressured the new military leadership to give up power and allow the return to power of Aristide.

Despite US led international sanctions and ultimatums, the military junta held on defiantly. Finally the US deployed 2000 marines off the Haitian coast along with warships and aircraft. Simultaneously the US engineered the adoption by the UN of Resolution 940 authorizing Chapter VIII enforcement measures by a multinational coalition to restore the Aristide government. The UN had sanctioned intervention in Haiti to restore democracy. The return of Aristide was later overseen by US forces on 15th October, 1994.[214]

In a strange twist to the case, in 2004, Aristide was again to flee Haiti. By his own account, he was literally seized from the presidential palace and put on a flight by American and French forces and flown to exile in Equatorial Guinea!

7.5 Intervention for Self-determination

The principle of self-determination was very much in vogue during the 1950s, 60s and 70s during the era of colonialism and colonial wars of liberation. Self-determination is a powerful and emotive principle the essence of which is that a distinct people have a right in certain circumstances to be free from domination and to determine their own destiny.

Various states of Eastern Europe, Asia and Africa supported the view that it was no violation of Article 2(4) for a state to intervene by force to help an entity to achieve independence from colonial rule. As might be expected, Western states (many of them colonial powers), among them the United States could not acknowledge the existence of any such right. Those who argued for the legality of

[214] UNSC Res. 940 UN. SCOR, 49th Sess. 3413th mtg at 23 UN DOCS/RES/940, (1994).

such use of force contended that neither Article 2(4) of the Charter nor any other provision of international law forbids authentic revolution and wars of independence. Indeed, they maintained, it was unlawful for a state to keep an unwilling people in colonial status, and such unlawfulness was compounded if a colony was maintained by force.

The Brezhnev and Monroe Doctrines of the Cold War era were both prosecuted as provision of assistance to legitimate governments or support for the cause of national self-determination.

Under the (Soviet) Brezhnev Doctrine, socialist states supported military interventions in numerous developing countries to preserve Marxist gains in the Eastern bloc.

On the other hand, the US prosecuted military interventions under the Monroe Doctrine to counter Communism and "further democracy."

It was evident that intervention was part of the overall conduct of big power politics, a tool involved in a process of the global engineering of the balance of power.

7.6 Intervention to Fight Terrorism and other Crimes

An "exception" that appears to be gaining currency and legitimacy is a tendency for Western states to justify intervention on the grounds of seeking to curb international crime, invariably in the Third World.

In the United States and Europe, the campaign against Third World threats is feverish. Terrorism has been re-defined to serve as an all-purpose metaphor for the Third World, demanding concerted action from the West. The threat of Third

World terrorism has recently been supplemented by a variety of new threats: the threat of nuclear proliferation, environmental terrorism, the danger of the drug trade and the rise of fundamentalism.

According to Furedi[215] discussion of the Third World tends to take the form of a shopping-list of threats often thin on facts and replete with generalizations, which allow for inflating a problem and transforming it into a "threat". Nuclear terrorists have been joined by drug dealers in the West's rogue's gallery. He argues that the invention of the Third World drug threat is even more absurd than the contributions on nuclear proliferation because it conveniently ignores that the market for drugs was created not by Bolivian peasants but by Western entrepreneurs.

7.7 Counter-intervention

Like intervention in support of self-determination, this limb of intervention found greatest prominence during the cold war era. The essence of this was that one power would send in its troops to a state whose ideological leaning it supported on the grounds that another power had similarly sent in its troops usually to support rebel activity opposed to the Government, or one power having sent in military help to assist the Government in such a country, another power would send help to assist the rival "government" or even rebels.

But this is always a limb of intervention clothed in euphemisms. When allusions to humanitarian objects are clearly hollow, states tend to justify their military interventions in the affairs of other states by invoking liberal interpretations of self-defence. The arguments justifying their unilateral military interventions are then couched in terms of counter-intervention against security threats. Examples of this kind of "counter-intervention" are the case of Tanzania in Uganda leading

215 Furedi, (1994): 115.

to the ouster of dictator Idi Amin, Vietnam in Cambodia during the Khmer Rouge period and India's intervention in Bengal prior to the establishment of Bangladesh.[216]

We may now consider in some detail some specific instances of the use of force and how these have been characterized vis-à-vis Articles 2(4) and 2(7)

7.8 The Case of Nicaragua

Nicaragua took to the International Court of Justice a dispute concerning military and paramilitary activities in and against Nicaragua by the United States of America.[217] Owing to a reservation by the United States of America in its acceptance of the jurisdiction of the International Court of Justice, the Court concluded that it had to exercise the jurisdiction conferred on it by the United States declaration of acceptance (of jurisdiction) under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law.

In the event, the Court although dealing with an instance of the "use of force", did not specifically address Article 2(4) of the Charter. It however suggested that the Charter could itself be construed as part of customary international law and from that point of view, article 2(4) and Article 2(7) were therefore very much in issue.

Nicaragua had complained that the United States had used actual force against her by laying mines in Nicaraguan internal or territorial waters in early 1984 and had also carried out attacks on Nicaraguan ports, oil installations and a naval base. Nicaragua also complained that the United States had engaged in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging,

216 Kwek, (2004).
217 Nicaragua V. United States of America (1986) ICJ Rep. 14.

supporting, aiding and directing military and paramilitary actions in and against Nicaragua.[218] Nicaragua contended that the United States was providing assistance to the rebel *contras* and was thus violating the principle of non-intervention in the internal affairs of Nicaragua contrary to international law.

Of particular interest in this case were the contentions of the United States in attempting to justify the actions complained of the United States argued that:

(a) it had supported rebels in Nicaragua and in fact attacked Nicaragua as an act of collective self-defence because Nicaragua had supplied arms to rebels in El Salvador and had attacked Costa Rica and Honduras (Para 229);

(b) it had acted on the request for assistance by the victim states (Honduras, El Salvador and Costa Rica);

(c) the assistance given by the United States to the contras was humanitarian assistance and was thus not a form of intervention in the internal affairs of Nicaragua;

(d) assistance to the contras was extended to them on their (contras) request;

(e) the action of the United States against Nicaragua was in response to the intervention by Nicaragua in the affairs of the three "victim" states and therefore a justified counter – intervention;

(f) the Government of Nicaragua was pursuing a systematic policy of violation of human rights and that the intervention by the United States aimed at assisting to preserve human rights in Nicaragua;

(g) the armed attacks on Nicaragua were justified because Nicaragua was engaged in "excessive" militarization which the United States perceived to be proof of its intention of aggression against neighbouring states.

218 Application para 26 (a) and (c)

The grounds cited by the United States make for very interesting reading indeed. They indeed summarize the principal pretexts, which have formed the basis of the disregard of Article 2(7) by powerful states in their relations with weaker states particularly with regard to the use of force.

Mercifully, in this particular case, the Court refused to be deceived by the arguments of the United States and in its judgment found *inter alia*:

(a) that there was no evidence that the Government of Nicaragua was responsible for the flow of arms to the opposition in El Salvador to amount to an armed attack by Nicaragua on El Salvador (para.230).

(b) although certain trans-border incursions into the territory of Honduras and Costa Rica were established to be imputable to the Government of Nicaragua, these could not be relied on to justify the exercise of a right of self defence (para.231)

(c) there was no evidence that the "victim" states had acted in the belief that they were victims of armed attack by Nicaragua or that they had requested the assistance of the United States for help in the exercise of collective self defence (para. 232)

(d) an essential feature of truly humanitarian aid is that it is given without discrimination and is given only for the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering and protect life and health and to ensure respect for the human being" In the circumstances "aid" given only to the contras (rebels) and their dependents could not escape the condemnation of intervention in the internal affairs of Nicaragua (para 243);

(e) the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention could be justified by a mere request for assistance made by an opposition group in another state. This would permit any state to intervene at any moment in the internal affairs of another state, whether at the request of the government or at the request of its opposition (para 246);

(f) the acts of which Nicaragua was accused by the United States, even assuming them to be true, could only have justified proportionate counter measures on the part of the states, which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter measures taken by a third state, the Unites States, and particularly could not justify intervention involving the use of force (Para 249);

(g) while the United States might form its own appraisal of the situation as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to steps actually taken, the Court asserted "the protection of human rights, a strictly humanitarian objective, could not be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras (para 268);

(h) On the so called excessive militarization, the Court held:
"It is irrelevant and inappropriate in the Court's opinion to pass upon this allegation of the United States, since in international law, there are no rules, other than such rules as may be accepted by the state concerned, by treaty or otherwise, whereby the level of armaments of a sovereign state can be limited, and this principle is valid for all states without exception" (para.269);

The decision of the Court helped to dispel some commonly touted excuses for intervention in the domestic affairs of weaker states. It must be noted however that all the findings of the Court were *ex post factum*. In other words, it is quite possible that findings like these may come too late after the damage has been done. Secondly because the ICJ does not have compulsory jurisdiction, it is often not possible for the weaker states whose domestic affairs have been meddled with to have recourse to the Court. In the event, the bulk of disputes related to the use of force have to be determined by the political organs of the United Nations, namely the General Assembly and the Security Council. In the case of the General Assembly, although it may condemn the actions of the powerful state involved, it

does not have the mechanisms for enforcing its decision and in particular, the General Assembly cannot order the use of force against the aggressor state.

The Security Council on the other hand does not afford suitable relief because of the veto power enjoyed by the permanent members of the Council, namely; the United States, Russia, China, France and the United Kingdom.

Article 27(3) of the Charter provides that decisions of the Security Council on all matters (except procedural matters) shall be made by an affirmative vote of nine members including the concurring votes of the permanent members. In practice, this means that a weaker nation cannot receive a favourable decision from the Security Council unless it advances the interests of all the five permanent members or is at least not adverse to the interests of any one of them.

We must also observe that where an intervention of the kind prosecuted by the US against Nicaragua succeeds, then there will probably be no complainant to take up the matter on behalf of the state in the United Nations. To take the example of the instant case, if American support for the *contras* had resulted in the rebels taking over the Government of Nicaragua, then it could not be expected that the new Government of Nicaragua would raise the issue of the unlawful intervention at the UN. A wrongful act would nevertheless have been committed. This was in fact the position in the case of the American invasion of Panama.

7.9 The Case of Panama

General Manuel Antonio Noriega, allegedly a former CIA informer who had fallen out with the United States Administration had become a powerful figure in the politics of Panama, a country with which the United States had a long history and strategic interest. In 1988, a prosecution was brought for the indictment of the

General in Miami in the United States on charges of drug smuggling and money laundering.

The then President of Panama Eric Delvalle then moved to remove General Noriega from his position as the head of the Panamian Defence Force (PDF) but he resisted and eventually organized the ouster of Delvalle as President. At this point the intervention by America for the purposes of our discussion began.

The Americans refused to recognize the new Government and insisted on recognizing the deposed Delvalle who was in hiding in a US military base in Panama. The US made no secret about its opposition to the Noriega led Government and its determination to bring him to justice, leading the Panamian National Assembly to adopt a resolution on 15th December 1989 to declare the Republic of Panama to be in a state of war for the duration of the aggression unleashed against the Panamian people by the United States Government.

The next day, a US soldier was killed in Panama by the Defence Forces and another soldier and his wife were assaulted. It was the long awaited signal for the US. On 20th December 1989, the US invaded Panama with a large force of about 25,000 troops in an operation named "Operation Just Cause" There was heavy use of firepower by the US and many civilian deaths. The US sought to capture General Noriega who took refuge in the Vatican Embassy. With the US threatening to storm the embassy, General Noriega surrendered and was forcefully transported to the United States to face the outstanding indictments against him.

Meanwhile the United States had installed a new civilian Government with the new President being sworn in at a US military base in Panama as the invasion proceeded.

Two issues are of particular interest. First, the arguments advanced by the US for invading a sovereign state in that manner, and secondly the consequences on the international plane of the US action.

On the first limb, the US pronouncements amounted to arguments that the intervention was justified on the grounds that:

a) Panama had declared that a state of war existed with the United States;

b) the acts of violence against US citizens attributable to General Noriega's Government had created a climate of aggression and placed American lives and interests in peril and jeopardized the integrity of the Panama Canals Treaties and that the invasion was necessary to-

"protect American lives in imminent danger, to defend democracy in Panama to apprehend Noriega and bring him to trial and to ensure the integrity of the Panama Canal Treaties."[219]

c) the deployment of US forces was an exercise of a right of self defence recognized in article 51of the United Nations Charter;

d) the deployment of the US forces in Panama was welcomed by the "democratically elected" Government of Panama.

None of these grounds can stand scrutiny and justify the attack by the US on Panama. On the claim that Panama had declared a state of war with the United States, it does not seem to be the case in international law that such a pronouncement alone, not backed with any positive act of aggression can entitle a state to attack another militarily. Furthermore, even the authenticity of the so-called declaration of war has been disputed. Rubin asserts:

219 President Bush's report to Congress 21st December 1989.

> "... as to... Noriega's supposed declaration of war, it doesn't exist. The Panamian Assembly on December 15, adopted a resolution ... that is an internal document, equivalent in Panamian law to what we would in English properly call a "state of emergency." It gave General Noriega dictatorial powers, but is not aimed at us or at the world at large..."[220]

None of that justifies military action because the threshold of self-defence has not been crossed.

On the "acts of violence" and the argument of self defence, again it is doubtful whether in international law, the killing of one soldier and the molestation of two other citizens could furnish a sufficient justification for invasion under the head of humanitarian intervention, or for that matter, self defence under Article 51 of the Charter. It is incontestable that the invasion by the United States did not constitute a proportionate response to the situation in Panama.

The last argument is similarly weak. The legitimacy of the Government of Panama was a matter only for the Panamians themselves. The fact was that General Noriega was the de facto leader of the sovereign state of Panama. Accordingly, there could be no valid argument that the invasion was invited by a "rival" Government. This clearly amounted to a violation of both Articles 2(4) and 2(7) of the Charter. As Henkin has said:

> "Like the law of the Charter on the use of force generally, the law on intervention does not make ideological distinction. A state may not intervene to help rebels, whether against a totalitarian or a democratic regime"[221]

Following the invasion and the installation of Guillermo Endara as new President of Panama on 29th December, 1989, the UN General Assembly voted 75-20 with

220 Quoted in an article in the New York Times, 2nd January, 1990, as cited in Carter and Trimble (1995): 1350.

221 Henkin, (1989) in Carter and Trimble, (1995): 1354.

39 countries abstaining, in favour of a resolution that "strongly deplored" the US invasion as a "flagrant violation of international law." The resolution also demanded an immediate ceasefire and troop withdrawal. But a UN General Assembly resolution could do no more than that. That resolution could not be enforced; except by the Security Council.

When a similarly worded resolution was introduced in the Security Council, the United States, Britain and France used their veto power to block its adoption. As might be expected, even Panama, which was the victim of the unlawful intervention, voted against the UN General Assembly resolution. This was to be expected because the new government in power had been installed by the United States as a result of that intervention.

The point we must make is that Article 2(4) and 2(7) were violated in this case with impunity and the UN, thanks to the veto power of the US and its allies, could not use the Security Council to deal with the situation. As it turned out, the US defied the General Assembly resolution and did not withdraw all her combat troops until about two months later.[222]

With the benefit of hindsight, it seems that even a vote by the Security Council is not of any consequence to a super power and more so, to the US when it has determined to take a particular course of action. The case of Iraq, which we will consider next, has clearly demonstrated that the United States will only abide by the decisions of the UN when these are favourable to her interests.

7.10 The Case of Iraq: the Locus Classicus

For the purposes of our discussion, the case of Iraq can be split into two distinct events, which we shall refer to as Gulf War I and Gulf War II. We argue that Gulf

222 Henkin, (1989) in Carter and Trimble, (1995): 1348.

War I was by and large a legitimate use of force by the international community while Gulf War II is a shocking violation of Charter provisions on non-intervention. We commence with a brief examination of Gulf War I so as to set the necessary background for a good understanding of Gulf War II.

On 2nd August, 1990 less than 24 hours after talks between Iraq and Kuwait relating to certain financial and territorial claims by Iraq, Iraq invaded and occupied Kuwait toppling that country's government and annexing its territory.

International reaction was swift and hostile. The Security Council was summoned on the same day and the five permanent veto-wielding members were unanimous and led other members in condemning the invasion and demanding that Iraq "withdraw immediately and unconditionally all its forces."[223]

It needs to be noted that Iraq's act in invading and annexing Kuwait was itself a shocking violation of the Charter's provisions on non-intervention. The outpouring of outrage by the international community and the ultimatum by the Security Council were entirely in keeping with the letter and spirit of the Act. But as we shall later observe, similar action was not forthcoming from the UN when Iraq was invaded by the US in March 2003 in what marked Gulf War II.

Iraq did not comply with Security Council Resolution 660 requiring Iraq to immediately withdraw its forces from Kuwait

In response to Iraqi intransigence, the UN passed a series of resolutions with varying consequences, some of which are as follows –

(a) S.C. Resolution 662 – declaring Iraq's purported annexation of Kuwait, null and void;

(b) S.C. Resolution 664 – demanding that Iraq free all detained foreigners;

223 S.C. Res. 660, 1990.

(c) S.C. Resolution 661 – imposing a comprehensive trade and financial boycott against Iraq and occupied Kuwait.

Despite these and many other resolutions of the Security Council, Iraq remained adamant, and by November 1990, it became clear that there might have to be recourse to the use of force. On 29th November, 1990, the UN Security Council passed Resolution 678 which *inter alia*

1. ....

2. "Authorizes member states cooperating with the Government of Kuwait, unless Iraq on or before 15th January, 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary measures to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area

3. Requests all states to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this Resolution...

The Resolution's reference to "all necessary means" was understood to authorize the possible use of force after 15th January, 1991 – only the second time the Security Council had authorized the use of force against a member, the first being in response to North Korea's invasion of South Korea, some 40 years earlier.

President Saddam Hussein of Iraq ignored the 15th January, 1991 ultimatum and the US, leading a host of its allies took it upon themselves to militarily attack Iraq to achieve compliance with the applicable UN Resolutions.

Several weeks of allied air and ground offensives were unleashed on Iraq culminating in the defeat of Iraqi forces on 28th February 1991 when the US declared that the war was over.

This chronology of events is necessary for understanding the second Gulf War of the year 2003.

7.11 Gulf War II

After the end of Gulf War I, the US led the Security Council in passing a major resolution imposing certain conditions on Iraq.

Resolution 687 (of 3rd April, 1991) famously known as the "ceasefire resolution," established a ceasefire on the basis of Iraq's acceptance of certain conditions deemed essential to the restoration of peace and stability in the Gulf. In particular, Iraq was required to give up its weapons of mass destruction. It also established a UN Special Commission designed to dismantle Iraq's weapons of mass destruction and to provide long term monitoring of Iraq's weapons systems. The Resolution also required Iraq to refrain from supporting international acts of terrorism.

Numerous other General Assembly and Security Council Resolutions followed touching different aspects of the conduct of the Iraqi regime. At the heart of the matter is that the US had in leading the war against Iraq, intended to oust Saddam Hussein as the President of Iraq. This had not succeeded; but that desire did not go away.

The US continued through the years to contend that Iraq was not adequately cooperating with the UN arms inspectors and that it was secretly manufacturing and stockpiling forbidden weaponry. By early 2003, the US was insisting that it had very convincing evidence that Iraq was in violation of UN Resolutions on banned weaponry. Ironically, the Bush Administration was at the same time

stating that the information was classified and that if it was revealed, it would harm America's intelligence gathering capability.[224]

In particular, the US had in November, 2002 led the Security Council in passing Resolution 1441 which while reinstating weapons inspection obligations on Iraq, provided for "serious consequences" if Iraq were to be found to be in material breach of the terms of that Resolution. It is Resolution 1441 that the US used as justification to attack Iraq.

Two obstacles stood in the way of the US's resolve to wage war on Iraq. The first was the UN's weapons inspectors, and the second was the Security Council. With the US determined to attack Iraq, it was vexing, to say the least when in the final week prior to the commencement of attacks, the UN's chief weapons inspectors, Hans Blix and Mohammed El Baradei, told the Security Council that Iraq was taking "proactive steps" to co-operate with the inspectors' requests, as demonstrated by Iraq's destruction the previous week of forty banned *Al-Samoud* missiles. It was vexing to the US because Resolution 1441 promised "serious consequences" only if "Iraq fails to comply." What then could be the justification for America's invasion when the UN inspectors were lauding Iraq's efforts at compliance?

The second obstacle related to the attitude of the members of the Security Council to the US pursuit. For the US to have its way, it required in accordance with Article 27(3) of the Charter, the votes of nine members, including the concurring votes of the permanent members of the Security Council. Russia and France (both permanent members) had hailed the progress made by Iraq and made it clear that they would block an American resolution calling for the invasion of Iraq. Most of the other members of the Council were fence sitting but were mostly leaning on

224 Time, February 3rd 2003 p. 25.

the side of the preponderance of international opinion – against war! Only Britain (despite hostile public opinion at home) was unequivocally in support of the invasion proposed.

In the end, both obstacles proved to be no obstacle at all. Regarding the weapons inspectors' reports, the US insisted that it had impeccable intelligence that in fact Iraq was still maintaining banned weapons. The US however declined to put all evidence on the table for the entire world to see, arguing that the US's intelligence gathering machinery and its security would thereby be compromised.

But the most far-reaching action related to the second obstacle: After weeks of lobbying for support for an armed attack on Iraq from the UN Security Council and with defeat in the Security Council, increasingly appearing to be a certainty, President Bush waxed defiant, stating in no uncertain terms that America was prepared to go to war, with or without the approval of the Security Council. He stated:

> "When it comes to our security, we really do not need anybody's permission."[225]

This was a stark reminder of what is probably US policy. On 2nd November, 1999, Richard Holbrooke, US Ambassador to the United Nations in a speech entitled "A New Realism for a New Era: The US and the UN in the 21st Century" had this to say:

> "We must not overlook a basic fact: the US will not always act through the UN. We have other vital instruments of national power at our disposal, as was demonstrated in both Bosnia and Kosovo, where NATO acted without UN authority. I would advocate similar actions again if they were in the national interest."[226]

225 CNN news 7th March, 2003.
226 Ambassador Richard C. Holbrooke, "A New Realism for a New Era: The US and the UN in the 21st Century, Address to the National Press Club, 2 November, 1999 (http://www.un.int/usa/99-103).

True to his word, as March 2003 drew to a close, America declared war on Iraq ostensibly to "disarm" Iraq. We argue that the invasion was a violation of Article 2(7) of the Charter in as far as it lacked any basis in international law. But it became worse as the war progressed.

What began as an expedition to find and destroy Iraq's banned weapons metamorphosed into a vicious pursuit to capture or assassinate the leader (no matter whether a good leader or a bad leader) of a sovereign state. Members of Iraq's ruling *Baath* party were similarly hunted down and murdered and hundreds of civilians were killed. Roads, bridges and other civil infrastructure were reduced to rubble by America's mighty firepower.

In just one month, Baghdad had fallen and Saddam Hussein, long the nemesis of the US had been deposed. The so-called "banned weapons" had however not been found, proving further that the US had prosecuted a war of aggression.

But the US did not then just pull out of Iraq. It went further and occupied a sovereign state and even installed one its nationals, one Mr. Paul Bremer, a retired diplomat as administrator. The rest of the world looked on – completely flabbergasted. At the time of writing, more than a year later the US is still effectively occupying and ruling Iraq.[227]

7.12 Conclusion

To conclude this Chapter, we advance the view that the US invasion of Iraq is testimony that international law in general and Article 2(7) in particular, have been thrown out of the window and their place has been taken by raw brawn and open defiance.

227 20th May, 2004.

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We must agree with one writer's assessment that:

> "To all extents and purposes, there are today two types of nations: the ones that have the legitimate right to interfere in the life of others, and the ones that have no intrinsic moral authority to run their own affairs... The absence of any serious criticism of Western intervention in Panama, Iraq, Somalia or Bosnia, suggests that new conventions towards the management of international affairs have already been accepted."[228]

But there can be no better summary of the point we have made in this Chapter, than these words from the same writer:

> "Military intervention is now seen as an acceptable method for regulating relations between and within states. This practice is not yet justified explicitly; the United Nations Charter for example still formally upholds the illegality of such interventions. A public attempt to re-write international law in favour of intervention would risk raising embarrassing questions about what right the United States has to bomb buildings in Mogadishu, or about who gave Britain the authority to decide whether an election is fair in Nicaragua or Kenya.
>
> However, the lack of substantive criticism of Western adventures today means that that arguments in favour of intervention have all but won. De facto if not de jure, the Western right to intervene in the affairs of other states now takes precedence over national sovereignty."[229]

Although there is clearly need to create a more civilised international regime in which human rights can genuinely flourish, this needs to be a regime of law, and

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progress towards this ideal can hardly be achieved by ignoring or destroying the frail international system created in 1945.

EPILOGUE

We have traced the history of the drafting of Article 2(7) and the purport of those who drafted it that the United Nations should not interfere in those matters, which were traditionally regarded as being within the domestic jurisdiction of states. As envisaged by the drafters of the Article the only exception to the general rule was the power invested in the Security Council to authorize enforcement measures to maintain or restore international peace under Chapter VII of the Charter, if it arrived at the decision that a particular situation arising out of a matter of domestic jurisdiction constituted a threat to or a breach of the peace.

We have traced the origins of the Article and found that the Article was the frontier beyond which the founders of the United Nations were unwilling to go in yielding to the jurisdiction of an international institution. We have seen however that after more than five decades, the UN as well as individual members have since bypassed those frontiers. Matters such as a state's form of government, the treatment of its own subjects, including questions of human rights, internal conflicts within a state's territory, the size of its armaments and armed forces, immigration policies, issues of nationality and economic policies, cannot today, going by the practice of the United Nations, be said to be recognized by that institution as being within domestic jurisdiction.

Regarding the demarcation of what constitutes "matters essentially within the domestic jurisdiction of a state," an observation made earlier above is germane: the practice of the United Nations across the years when dealing with questions of human rights, colonial questions involving the self determination of peoples, and the regulation of national armaments, is conducive to no other finding but that this province is fluid and continuously diminishing.

On the meaning of the term "intervention", we have seen that whatever may have been the intentions of the drafters of the Article, the term has been interpreted with considerable elasticity; an almost no holds barred approach under which, depending on the political mood of the United Nations, any action is permitted.

The lacuna created by the failure of Article 2(7) to invest in an organ of the United Nations the competence to make a determination when the Article is applicable has been dealt with in a most interesting manner. Our study has shown that organs of the UN have been averse to any suggestions that they had no competence to make such a determination and have proceeded as if the Charter had ordained that every organ before which objections based on Article 2(7) were raised was competent to decide on that preliminary question.

In the second part of this study, we have reflected on some aspects of the application of the Article. Under this Part we have seen how intrusively certain financial institutions of the UN have penetrated into the lives of some countries especially the poorer countries in the developing world. This is so even where this is openly in contravention of Article 2(7).

In the final Chapter we have seen that Article 2(7) has become the plaything of ideology and power. Might has become right. Powerful countries can afford to disregard Article 2(7) with impunity while weaker states cannot look to the Article to protect them when they are invaded.

In the unipolar system that has characterized the period since the collapse of the Soviet Union as an alternative power base, it is clear that the United States of America will have its way despite world opinion to the contrary.

Article 2(7) will only be observed by those who are not strong enough to defy it or by the strong when they consent to observe it, for clearly the United Nations is powerless against a state like the United States of America when it decides to ignore Article 2(7) as the American invasion of Iraq has so clearly brought home.

This study has been able, I hope, to clarify for the student of international law and for others interested in the workings of the United Nations, a primary principle of the Charter whose meaning and scope has been and will continue to be controversial. Without the benefit of an insight into this discussion (or similar discussions) anyone reading Article 2(7) would be sorely misled.

This Article perhaps more than any other has substantially been modified by United Nations practice during the more than five decades of its application. It leads one to wonder whether it is not perhaps time now for the Article to be amended so that the law and the practice are in harmony.

It has to be conceded however, that an amendment of so fundamental an Article of the Charter is probably too difficult to be attempted at the present moment. For international relations are not purely about law, they are also and probably more so, about politics. This is to say that even if the majority of nations were to amend the law, this would not of and itself mean that such a law would be observed by the minority, especially if such minority wielded economic and military might. From what has emerged in this entire study, however, the following "amended" Article 2(7) would probably go some way to reduce the confusion and uncertainty inherent in this Article:

> "Nothing contained in the present Charter shall authorize the United Nations or any of its members to intervene in matters which by contemporary international law and the conduct of international relations, are essentially within the domestic jurisdiction of any

state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII:

Provided that for the purpose of this Article any organ of the United Nations before which an objection is raised that a matter is essentially within the domestic jurisdiction of a State, or before which a complaint is made that an intervention contrary to this Article has occurred or is about to occur, is competent to give a determination on that objection or on such complaint, and such determination shall not itself be construed to constitute intervention."

But some caution is advised, for as Brierly said seventy-nine years ago:

"It is vitally urgent that we should face the problem raised by disputes arising from matters of domestic jurisdiction, provided that we face it wisely; for it would be better to do nothing at all than to let our impatience for a solution outrun the limits of what is practicable in the present state of international feeling, and thus almost certainly to offer to the world a solution which will prove later to have solved nothing."[230]

230 Brierly, (1925), 14.

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